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Supreme Court of the United States

October Term, 1995

CAL-ALMOND, INC.; SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC.; GOLD HILLS NUT COMPANY, INC.; FRAZIER NUT FARMS, INC. and CARLSON FARMS,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress authorized the Secretary of Agriculture to issue regulations designed to promote "orderly marketing" in the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*). The Secretary issued Marketing Order 981 for almonds which included a tax on handlers to fund an industry-wide generic promotion program (7 C.F.R. §§ 981.41, 981.81). Each almond handler paid a part of the tax directly to an industry board, and was required to pay a portion to third parties, *e.g.*, advertisers as approved by USDA (7 C.F.R. §§ 981.41 and 981.441) or to the Board in lieu thereof — which then spent it on advertising and promotion with which Petitioners did not agree. USDA by regulation treated payments to the Board and to third parties the same for purposes of computing refunds due handlers (7 C.F.R. § 981.81(b)). Congress consented to suits against the Secretary so that handlers could challenge marketing orders, regulations and "obligations" such as the advertising assessments, and obtain a "modification" or "exemption" from the obligation (7 U.S.C. § 608c(15)). Because Congress did not provide any pre-deprivation remedy to an aggrieved handler, the remedial scheme was considered "complete" and was intended to provide handlers an "appropriate" opportunity for the correction of errors and an "exemption" from "obligations." (*United States v. Ruzicka*, 329 U.S. 287 (1946)). Petitioners sued the Secretary to obtain a refund of the promotion taxes, claiming they were unconstitutionally exacted in violation of the First Amendment. Approximately seven years later the Ninth Circuit held that all mandatory assessments (whether paid to the Board or third party advertisers) for advertising and promotion violated the First Amendment (*Cal-Almond I*). After remand to the District Court to determine the remedy (which gave a complete remedy), the Ninth Circuit ordered a refund of that portion of the promotion and advertising tax paid to the Board, *but not* the amount the Petitioners spent on advertising (approximately $2,500,000) on behalf of USDA and

pursuant to USDA mandate and regulations (7 C.F.R. §§ 981.41 and 981.441), holding that a refund of the assessments unconstitutionally exacted, but spent on USDA ordered advertising, is barred by sovereign immunity because they were not paid to the Board and thus would be "money damages". The amount in question is approximately $2,500,000 *(Cal-Almond II)*. The questions presented in this petition are:

1. Whether congressional consent to suit (7 U.S.C. § 608c(15)) challenging any "obligation" *limits* a refund of unconstitutional taxes on the grounds that they were paid to third parties at the direction of the Secretary (or whether precluding a refund would deny due process; *Reich v. Collins*, __ U.S. __, 115 S. Ct. 547 (1994))?

2. Whether a refund of unconstitutionally imposed assessments, even if paid to third party advertisers but at the direction of USDA, is a suit in *equity* for restitution or recoupment (*Bowen v. Massachusetts*, 487 U.S. 879 (1988)) or at law, "money damages?"

3. In lieu of the above, whether the Ninth Circuit should have ordered an alternative remedy (such as a credits towards future assessments, or repayment from the Almond Board) in the event that sovereign immunity barred direct monetary refunds by the Secretary?

PARTIES TO THE PROCEEDINGS

The Petitioners are Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., Gold Hills Nut Company, Inc., Frazier Nut Farms, Inc. and Carlson Farms.

None of the Fetitioners have any parent companies nor any subsidiaries nor do any of them issue shares of stock to the public. (Rules of the Supreme Court, Rule 29(6)). The Respondent is the United States Department of Agriculture.

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OPINIONS BELOW

The opinion of the court of appeals (App. B) is reported at 67 F.3d 874 (9th Cir. 1995) hereinafter referred to as *Cal-Almond II*. The opinion of the district court (App. F) is unreported. The previous decision of the Ninth Circuit Court of Appeals (App. C) is reported at 14 F.3d 429 (9th Cir. 1993) hereinafter *Cal-Almond I* which, after finding that the advertising and promotion assessments imposed against the almond handler Petitioners violated Petitioners' rights guaranteed under the First Amendment of United States Constitution, remanded it back to the district court for a remedy. (That *Cal-Almond I* decision is final, as no further review was sought by the Solicitor General). The district court provided a complete remedy (App. D, E, F) which then led to the opinion of the Ninth Circuit Court of Appeals in *Cal-Almond II*, from which Petitioners seek review.

STATEMENT OF JURISDICTION

The judgment of the court of appeals in *Cal-Almond II* was entered on May 11, 1995. Petitioners petitioned for rehearing with a suggestion for rehearing en banc which was denied on February 20, 1996. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Rules of the Supreme Court, Rule 13, subsections 1 and 3.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. §§ 608c(1)-(2),

608c(6)(I), 608c(7)(C), 608c(10), 608c(15)(A)-(B), and § 610(b)(1) & (2)(ii). They are reproduced at App. H (106a-111a). The relevant almond regulations implementing the Act are (1990 Edition) 7 C.F.R. §§ 981.13, 981.41, 981.81, and 981.441. They are reproduced at App. H (112a-127a).[1]

STATEMENT OF THE CASE

This case presents an issue of first impression regarding sovereign immunity, *i.e.* whether it would violate that doctrine to refund unconstitutionally imposed advertising and promotion assessments spent by the Petitioners — by compulsion of USDA mandates — when there was no pre-deprivation remedy and there was mandatorily required exhaustion of administrative remedies pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA or Act) 7 U.S.C. § 601 *et seq.*, specifically § 608c(15)(A) (App. 109a) and (B), as construed by this Court in *United States v. Ruzicka*, 329 U.S. 287 (1946). Besides the monetary two and half millions dollars at stake here, due process and the First Amendment are at stake as well.

The Petitioners are all almond handlers regulated by the Act and the Almond Marketing Order, 7 C.F.R. § 981.1 *et seq.* Section 608(6)(I) (App. 107a) permits — but does not mandate —the Secretary of USDA to impose advertising and promotion assessments upon handlers of almonds, and permits credit

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1. After the appeals were filed with the Ninth Circuit Court of Appeals resulting in *Cal-Almond I*, but before a decision, the Secretary of USDA, upon recommendation of the Almond Board, made changes to the credit for market promotion activities, including paid advertising, pursuant to 7 C.F.R. § 981.441 (58 Fed. Reg. 43505, August 17, 1993) but that played no part in either the *Cal-Almond I* decision or the *Cal-Almond II* decision, with the *Cal-Almond II* decision being the decision which led to Petitioners' petition for a writ of certiorari before this Court. That is why the Appendix contains the pre-1993 amendments.

towards the advertising and promotion assessments (creditable advertising assessments) for the handlers' own expenditures.

Sections 981.81 (App. 115a) and 981.41 (App. 113a) incorporate the language of 608c(6)(I) of the Act into the Almond Marketing Order program. The regulations imposed by the Secretary (7 C.F.R. § 981.441; App. 117a) restricts the type of credits that a handler can receive for its own advertising and promotion.

After almost 7 years of exhausting administrative remedies pursuant to § 608c(15)(A) and (B), as construed by this Court in *Ruzicka, supra*,[2] the Ninth Circuit Court of Appeals held in *Cal-Almond I* that requiring the handlers to spend money on behalf of USDA on advertising and promotion pursuant to rules dictated by USDA, or, in lieu thereof, paying the money to the Almond Board, which would then advertise and promote almonds generically, violated the Petitioners' rights under the First Amendment of the United States Constitution. (App. 39a). In the original *Cal-Almond I* decision, the Ninth Circuit found that there was no benefit to the Petitioners from the advertising and promotion program (App. 34a-38a) and that the program was designed to benefit the largest company in the industry, Blue Diamond "who overwhelmingly dominates the retail almond

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2. In fact, Petitioner Saulsbury, because of the length of the delays in the administrative process, brought suit directly in District Court challenging the advertising and promotion assessments. The case was dismissed by the District Court for failure to exhaust administrative remedies, and the Ninth Circuit Court of Appeals in *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1193 (9th Cir. 1990) affirmed the District Court because Saulsbury had not exhausted its administrative remedies. In response to Saulsbury's due process challenge that it would violate due process to force Saulsbury to exhaust with no clear and certain remedy, the Ninth Circuit held that there would be no due process violation because a refund of assessments found not to have been due would be in order if Saulsbury prevailed. *Id.* at 1195.

market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers." (App. 38a; *see also,* App. 37a n. 10). The court also held that the USDA restrictions denying credit harmed Petitioners. (App. 34a-38a). Again, the Ninth Circuit in *Cal-Almond I* stated that due process was not violated as a result of the requirement of exhaustion of administrative remedies because handlers who prevail in their administrative petitions are entitled to a refund of assessments "*found not to have been due.*" (emphasis added) (App. 60a-61a). The Ninth Circuit then remanded the matter to the District Court to determine the remedy. (App. 61a).

Following the remand the Petitioners and the Department of Justice stipulated as to the amount of the assessments used or forcibly spent on advertising and promotion, breaking it down into four categories: creditable advertising assessments paid to the Board, the amount the handlers spent on creditable advertising pursuant to the forced assessments, the portion of the annual assessments paid which were applied towards the Board's generic promotional activities[3] and any creditable advertising assessments the handlers began placing into escrow in defiance of USDA's requirement that the handlers could not do so[4]. (App. 97a). Following the parties stipulation which separated out the administrative assessments (*see* footnote 3)

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3. The Almond Board engages in a variety of activities including research, development, marketing, quality control and volume regulation. Mandatory assessments are paid to the Board for that. A portion of that assessment paid to the Board (the administrative assessment) the Board uses to fund its own generic promotion and advertising program. (*Cal-Almond I*, App. 21a-24a). The administrative assessments used for other than promotion and advertising are not in dispute in this litigation.

4. Cal-Almond was sued by the United States when it began escrowing advertising assessments. That matter was not resolved by the time the *Cal-Almond I* decision was filed.

from the assessments for mandatory advertising and promotion, the District Court issued an order holding that Petitioners were entitled to a refund of all *advertising* and *promotion assessments* paid to the Board, all advertising and promotional assessments spent by the handler for USDA approved credit, and released all assessments that any of the Petitioners had been escrowing. (App. 70a). The court followed up with judgments to that affect. (App. 62a-69a). The government appealed to the Ninth Circuit from the District Court judgments, and after briefs were filed and oral arguments occurred, the Ninth Circuit rendered its judgment in *Cal-Almond II* (67 F.3d 874 (9th Cir. 1995); App. 3a). The Ninth Circuit recounted what they had held in *Cal-Almond I*, stating: "We found that the assessments implicated the handlers' rights to free speech and free association, regardless of whether the assessments were paid directly to the Board or satisfied by expenditures on creditable advertising and promotional activities." (App. 5a).

The Ninth Circuit in *Cal-Almond II* upheld the District Court with respect to all categories of refunds, except the approximately $2.5 million dollars that the handlers "had paid third parties for creditable advertising." (App. 18a).

The Ninth Circuit held that claims for specific relief, equitable relief, are not subject to sovereign immunity, and therefore the assessments paid to the Almond Board for advertising and promotion would not violate sovereign immunity (App. 6a n. 1), but where the handlers, under compulsion pursuant to the regulations, spent money on advertising and promotion pursuant to USDA's rules and regulations as opposed to just paying the money to the Almond Board, it was not a suit for specific relief to retrieve that money, but was a "substitute for a suffered loss", making it a suit for money damages barred by sovereign immunity. (App. 7a). The Ninth Circuit stated:

> Requiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige USDA to "substitute" money from its coffers for money the handlers had paid to third parties. Unlike the assessments paid directly to the Board, in a situation of the money paid for creditable advertising, the USDA cannot return the "precise property wrongfully taken" because that money was not paid to the USDA. Reimbursement for the money handlers spent on creditable advertising would therefore constitute damages.

(App. 7a). The Ninth Circuit held that there was nothing in the Act that demonstrated a congressional intent to waive sovereign immunity for the amounts expended on creditable advertising. (App. 7a).

The Ninth Circuit analyzed the difference between the wrong and the remedy, and with respect to whether or not the program violated the First Amendment, the Court held: "For the purpose of that analysis, it did not matter to whom the money was paid; it only mattered that the payments were coercive and required the handlers to fund dissemination of a particular message. However, when analyzing what remedies are available, it matters a great deal whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties because of the doctrine of sovereign immunity." (App. 10a).

Indeed, the Ninth Circuit in *Cal-Almond II* was troubled by their holding: "Our analysis regarding sovereign immunity leads us to a somewhat awkward result: Although the handlers' compelled expenditures on creditable advertising violated their

First Amendment rights, there is no individual remediation available for those violations." (App. 10a).

The Ninth Circuit criticized the sovereign immunity doctrine but held: "Under the doctrine of sovereign immunity, we are compelled to conclude that the handlers' claims for reimbursement of the amounts that they were *wrongfully compelled to pay for creditable advertising* is a right for which there is no individual remedy." (Emphasis added). (App. 10a-11a).

Because the Ninth Circuit failed to analyze several of Petitioners' arguments as to why sovereign immunity is not violated with respect to a refund of the amounts of money Petitioners forcibly paid for creditable advertising and because the Ninth Circuit analysis did not confront due process problems associated with its result (*Reich v. Collins*, __ U.S. __, 115 S. Ct. 547 (1994)) Petitioners petitioned for a rehearing with a suggestion for rehearing en banc, arguing:

1. Congress has specifically consented to these handlers' challenge to these assessments and provided for an equitable remedy under the special and unique review scheme of the Act, 7 U.S.C. § 608c(15), which is an even more specific and clear consent to suit for specific relief other than money damages found in § 702 of the APA (App. 103a) (which this Court in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) held did not bar a return of money as a form of specific relief);

2. Neither the lack of a prior appropriation in the federal grant program nor the fact that the handlers paid a portion of the unlawful assessments to third parties is a defense or a basis for denying jurisdiction to challenge the underlying *obligation, i.e.*, the government-imposed duty to pay the tax either to the Board/Secretary or to third parties because the handlers are paying it on behalf of USDA and the Board, not on their own behalf;

3. Under the Almond Board program, USDA has provided by regulation that assessment payments to third parties on behalf of the Board/Secretary are to be treated as if they had been paid directly to the Board for purposes of computing assessment refunds (7 C.F.R. § 981.81(b)), which provides that "for purposes of computing any refund from the marketing promotion portion, each handlers payment of assessments shall include any amount credited to the handler pursuant to § 981.41"; (App. 115a at 117a).

4. The panel's crabbed limitation of the remedy provided by the Act would implicitly overturn the Court's previous rulings that required exhaustion of "remedies" and therefore due process rights would be violated for failure to provide for a refund;

5. Sovereign immunity would not be violated if the restitution order was directed against the Almond Board which would completely avoid any impact on the treasury;

6. It would not have any impact on the treasury and therefore not violate sovereign immunity if the Secretary was ordered to grant the handlers credits (tradeable, assignable, and sellable) against future assessments, which would be a nonmonetary remedy that would not affect the treasury or implicate sovereign immunity.

On February 20, 1996, the Ninth Circuit, without opinion, denied Petitioners' petition for rehearing and suggestion for rehearing en banc. (App. 1a).

REASONS FOR GRANTING THE WRIT

Congress unequivocally consented to being sued by almond handlers such as Petitioners in 7 U.S.C. § 608c(15) (App. 109a). The scope of that consent was broad, authorizing a claim that an

"obligation" such as the advertising assessments imposed here was "not in accordance with law." The scope of the remedies provided by Congress was similarly broad, allowing either a "modification" or an "exemption" from the "obligation" to pay the advertising assessment. Congress intended, and this Court has held in *Ruzicka*, that this procedure for challenging assessments was a "complete" procedural scheme and afforded an "appropriate opportunity for the correction of errors." Congress did not specifically provide for a pre-deprivation remedy, and USDA has strenuously refused to grant one. Moreover, the courts have been uniform, including this Court in *Ruzicka*, in requiring handlers to exhaust administrative remedies. Until the Ninth Circuit's decision in *Cal-Almond II*, every court that had discussed the issue had concluded that this lengthy and burdensome exhaustion scheme afforded an adequate remedy and did not violate due process because handlers were entitled to a full refund of assessments found not to have been due. (*See* collection of cases in *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1995 (9th Cir. 1990.)) Now, for the first time in history of this so-called complete remedial scheme, the Ninth Circuit, although it found the assessments unconstitutional, has carved out an exception for assessments paid to third parties. The AMAA and the Order treat the assessment obligation identically, § 981.81(b), whether the destination of the payments was the Board or third parties — *i.e.* the obligation to pay them remained the same. Nothing in the plain language of the AMAA or in its legislative history provided for such a carve-out, or even suggested that there be any limitation on challenges to "obligation[s]," which in this case just happened to be the obligation to pay $2.5 million. *Cf. United States v. Nordic Village*, 503 U.S. 30 (1992), in which the Court approved a remedy limitation for a single class of bankruptcy claims under a statutory scheme which allowed a remedy, and did not carve up the remedy into bits and pieces — depending on the recipient of money — as the Ninth Circuit has somehow divined

out of whole cloth. Where Congress has unquestionably waived sovereign immunity and consented to suit, as in this case, and the issue which troubled the Ninth Circuit concerns the scope and terms of the waiver, "the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.' " *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (*quoting United States v. Kubrick*, 444 U.S. 111, 118 (1979)). The decision by the Ninth Circuit Court of Appeals decided an important question of federal law that either conflicts with relevant decisions of this Court, or, at the very least, has decided an important question of federal law that has not been, but should be, settled by this Court (Rule 10(c), Rules of the Sup.Ct.). The reasons for review are compelled by the following statutory and regulatory scheme, the First Amendment and Due Process Clause of the Fifth Amendment and this Court's construction of both.

1. Congress authorized — but did not mandate — that the Secretary of USDA could establish, in a marketing order assessments for promotion and advertising, and with respect to almonds (and other agricultural products) and could permit crediting part of the assessment towards the handlers' expenditures towards own advertising and promotion (7 U.S.C. § 608c(6)(I); App. 107a);

2. Section 981.81 of the Almond Marketing Order established assessments for the Almond Board's functions, including advertising and promotion less any amounts deemed by USDA to be creditable pursuant to § 981.41 of the Almond Marketing Order for the handlers' promotion and advertising expenditures (App.115a and 113a);

3. The Secretary promulgated regulations (7 C.F.R. § 981.441; App. 117a) dictating where, how and when handlers must expend said assessments for their own advertising and promotional efforts expended on behalf of USDA's agent, the Almond Board of California;

4. After expending approximately seven years of time exhausting administrative remedies pursuant to 7 U.S.C. § 608c(15)(A) and (B), with no pre-deprevation remedies, the Ninth Circuit Court of Appeals in *Cal-Almond I* (in a case that is now final, as the Solicitor General never sought review of that decision) declared that: (a) that the Almond Marketing Order compels handlers to expend a certain sum of money every year, either on payment of assessments to the Almond Board which would engage in promotion and advertising, or on the handlers own creditable advertising and therefore either alternative (payment to the Board or expenditures on advertising and promotion pursuant to USDA dictates) infringed on Petitioners' rights of free speech (App. 24a-28a); (b) that there is no evidence that USDA's promotion and advertising program substantially advanced the governmental interest in increasing producer returns or consumption of almonds (App. 31a-36a); (c) that the Petitioners received no benefit whatsoever out of the program, and in fact hindered the Petitioners' efforts to increase sales and returns to growers (App. 34a-38a); (d) that the creditable advertising and promotional regulations were not narrowly tailored because they hindered the Petitioners' efforts, and were designed to benefit the largest competitor in the industry, Blue Diamond, at the expense of the Petitioners, and were too restrictive; and (e) *both* USDA's requirement of paying the money to the Almond Board for advertising and promotion, and expenditures by the handlers for creditable advertising violated Petitioners' rights under the First Amendment of the United States Constitution. (App. 37a-39a).

5. In response to Petitioners' argument that the exhaustion requirement of 7 U.S.C. § 608c(15) violated due process because there was no clear and certain remedy, the Ninth Circuit ruled that it has already held that handlers who prevail in their administrative petitions can receive a refund of any assessments "found not to have been due." (App. 60a-61a);

6. Upon remand to the District Court to determine a remedy (App. 61a), the District Court held that the Petitioners were entitled to a refund of all assessments that were paid to the Board for the Board's generic promotion and advertising program, *and* all assessments the Petitioners spent, pursuant to USDA dictates, on creditable promotion and advertising (App. 62a-94a);

7. As a result of the Appeal by the government from the District Court ruling, the Ninth Circuit held that if the assessments were not paid to the Almond Board, but instead paid to third parties (advertising and promotional firms, magazines, etc.) for creditable advertising expenditures, the suit was one for money damages, not specific equitable relief and therefore sovereign immunity applies.

The Ninth Circuit contrived an exception to Congress' consent to suit and provision for a complete remedy. Sovereign immunity does not bar a refund, because:

1. By enacting § 608c(15) of the Act, Congress provided handlers the remedy of contesting — first before USDA and then the District Court — any *obligation* imposed by a marketing order. Since exhaustion of administrative remedies is required (*United States v. Ruzicka, supra*) a handler can not receive an "exemption" from an "obligation" (to pay assessments) unless there is a refund; i.e. if there is no refund there is no "exemption," because there is no pre-deprivation remedy. (*Reich v. Collins, infra*);

2. This Court construed the statutory scheme, including the fact that there is no pre-deprivation remedy, as the procedure devised by Congress to provide an aggrieved handler with "an appropriate opportunity" to challenge any obligation under a marketing order (even with respect to constitutional issues) and provided handlers with a remedy in the event a regulation is not

in accordance with law (*United States v. Ruzicka, supra*) (*Ruzicka* was based (as argued by the Solicitor General in its brief) on the availability of a monetary remedy for a successful challenge to required assessments paid to a producer settlement fund, just like payments to "third parties" in this case);

3. USDA does not provide any pre-deprivation remedy so the Petitioners must comply with the assessment scheme for promotion and advertising while they exhaust administrative remedies. The Petitioners did that by paying the assessments to the Almond Board (which then uses them for generic promotion and advertising) and expending them on creditable forms of advertising and promotion on behalf of USDA and therefore Petitioners request for a refund of assessments it spent on creditable advertising is either within the scope of consent to suit provided by Congress (§ 608c(15)) or is equitable relief (not money damages) and therefore not repugnant to the sovereign immunity doctrine (*Bowen v. Massachusetts, supra*), or it is a suit for recoupment of "money improperly exacted or retained" (*United States v. Testan*, 424 U.S. 392, 401-402 (1976)), likewise not barred by sovereign immunity;

4. By refusing to provide a remedy for assessments spent pursuant to USDA dictates and on behalf of USDA, without providing a post-deprivation remedy (and without any pre-deprivation remedy) it would violate due process because a taxing scheme that provides no pre-deprivation remedy, must provide a clear and certain post-deprivation remedy (*Reich v. Collins*, __ U.S. __, 115 S. Ct. 547, 550-551 (1994); *Harper v. Virginia Dept. Of Taxation*, 509 U.S. ___, 113 S. Ct. 2510, 2519 (1993); *McKesson Corp. v. Div. Of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990));

5. USDA itself treats expenditures for creditable advertising exactly the same way as if a handler, in lieu of

spending the money pursuant to USDA mandates, paid it to the Almond Board (7 C.F.R. § 981.81(b)) ("for the purpose of computing any refund from the marketing promotion portion, each handler's payment of assessments shall include any amount credited to the handler pursuant to § 981.41"; App. 115a-117a);

6. As an alternative (raised below but not addressed by the Ninth Circuit), it would not violate sovereign immunity if the refund came from the Almond Board of California, rather than the United States treasury, as the Almond Board is funded by industry assessments, not tax payer dollars; and

7. As a second alternative raised below (but again not addressed by the Ninth Circuit), allowing the petitioning handler credit (assignable, saleable and transferable) towards future Almond Board assessments, to the extent of the amounts that the petitioning handlers were unconstitutionally required to spend on creditable advertising, would not be expenditures from the treasury and therefore not violate sovereign immunity.

The Ninth Circuit's decision in *Cal-Almond II* conflicts with relevant decisions of this Court, to wit: it conflicts with this Court's decision in *United States v. Ruzicka, supra* which analyzed why Congress intended handlers governed by marketing orders to exhaust administrative remedies and could receive no pre-deprivation relief, because the success of the marketing orders required full compliance by handlers while they exhausted administrative remedies, but handlers aggrieved by any marketing order obligation had "an appropriate opportunity for the correction of errors or abuses by the agency charged [with control] . . . ." (*id.* at 292), and that "handlers are thus assured opportunity to establish claims of grievances while steps for the protection of industry as a whole may go forward" (*id.*); the complete remedial scheme "thereby safeguarded individual as well as collective interests" (*id.* at 293); and the

grievance scheme "will give the respondents the rights to which Congress said they were entitled." (*id.*) The case of *Ruzicka* involved a handler's grievance with respect to assessments to be paid into the milk producer settlement fund. This Court held that the handler's remedy would be a refund of any assessments found to have been exacted in violation of the law. This Court in *Ruzicka* further declared that as to handlers "the procedural scheme is complete." *Ruzicka* at 295. In the present case, the Ninth Circuit found it "awkward" in finalizing its holding that "although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations." (App. 10a). This is not what this Court intended in *Ruzicka*, nor what Congress intended by establishing an exhaustion requirement where handlers could challenge any "obligation" imposed as a result of a marketing order, and receive an "exemption."

Whether Congress has waived sovereign immunity is not limited to looking in the statute for "explicit language . . . waiving sovereign immunity" but of "statutory interpretation." (*Block v. North Dakota*, 461 U.S. 273, 287 (1983)) Congress does not even have to utter the words sovereign immunity at all for a waiver to occur. *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia J. concurring). *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989). Since the court in *Ruzicka* stated that a handler's remedy is "complete" *and involved an "assessment"* § 608c(15) waives sovereign immunity with respect to a refund of assessments, as that is the only way to receive an "exemption" (whereas a "modification" of an order or obligation would be purely prospective relief).

The Ninth Circuit decision in *Cal-Almond II* also conflicts with this Court's announcement in *United States v. Testan, supra* wherein it held that sovereign immunity barred providing an employee from receiving back pay for the government's failure

to reclassify and promote an employee because Congress did not explicitly waive sovereign immunity with respect to back pay. However, in that regard this Court stated "where the United States is the defendant and the plaintiff is not suing for money improperly *exacted* or retained . . . " (emphasis added) the complaining party must establish that Congress intended to award compensation for the damage sustained. In this case, the government is the defendant and the petitioners have already established in *Cal-Almond I* (a case that is final) that USDA's imposition of assessments for creditable advertising violated the Petitioners' First Amendment rights, and therefore those assessments were improperly "exacted", regardless of whether they were paid to the Almond Board or spent pursuant to USDA's unconstitutional requirements. Since the Ninth Circuit found in *Cal-Almond I* that both the payment to the Almond Board for promotion and advertising and creditable advertising expenditures mandated by USDA violated the First Amendment, the handlers were not given any constitutional "choice" whatsoever. As this Court held in *New York v. United States, et al.*, 505 U.S. 144, 176 (1992) "a choice between two unconstitutionally coercive regulatory techniques is no choice at all."

The Ninth Circuit's decision in *Cal-Almond II* also conflicts with several decisions from this Court regarding "tax" cases wherein this Court held that if the taxpayer must comply with the law and complain later there must be a clear and certain remedy following that complaint and a refund of the unconstitutionally exacted tax if there was no other alternative way to make it constitutional or no other way was chosen by the taxing authority. *McKesson Corp. v. Div. Of Alcoholic Beverages and Tobacco, Fl. Dept. Of Business Regulations*, 496 U.S. 18, 31 (1990) (and cases cited therein); *Harper v. Virginia Dept. Of Taxation*, 509 U.S. __, __, 113 S. Ct. 2510, 2519 (1993) (this Court also held there that a refund applied retroactively,

overruling previous cases which provided only prospective relief): *Reich v. Collins*, __ U.S. __, 115 S. Ct. 547, 550-551 (1994) (Georgia could not, without violating due process, replace a post-deprivation remedy with a pre-deprivation remedy in the middle of the lawsuit because it would amount to a "bate and switch" to prevent a meaningful remedy and is thus precluded by due process). There is no other way to make this program constitutional — given the exhaustion requirements — except a refund.

This Court recently restated the complete remedial scheme in *Block v. Community Nutrition Institute*, 467 U.S. 340, 346 (1984). This Court again stated that § 608c(15) absolutely requires handlers to first exhaust the administrative remedies made available by the Secretary (*id.* at 346), and that handlers are not even entitled to enjoin unlawful regulations, but instead must follow the exhaustion requirements. *id.* at 348. There this Court held that consumers had no remedy and producers had only a limited remedy because of the completeness and carefully balanced nature of the remedy given handlers.

The Ninth Circuit's decision in *Cal-Almond II* must be reversed. The almond promotion and advertising program is still ongoing, Petitioners are still exhausting administrative remedies with respect to the new assessments and new advertising regulations and if the Petitioners must comply during the years of exhausting administrative remedies, there must be a refund of any assessments unconstitutionally exacted. The Ninth Circuit, following this Court's pronouncement in *Ruzicka,* has not permitted any direct attacks on marketing orders without exhausting administrative remedies. *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190 (9th Cir. 1990) (and cases cited therein); *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985); *Navel Orange Administrative Committee v. Exeter Orange Company*, 722 F.2d 449 (9th Cir.

1983); *United States v. Riverbend Farms*, 847 F.2d 553 (9th Cir. 1988); and *Rasmussen v. Hardin*, 461 F.2d 595 (9th Cir.), *cert. den'd*, 409 U.S. 933 (1972). However, the Ninth Circuit repeatedly has held that if the handlers prevail in their administrative challenge they are entitled to a refund of any assessments found "not to have been due." *Saulsbury Orchards and Almond Processing, Inc., supra*, 917 F.2d at 1195. The decision in *Cal-Almond II* is thus totally inconsistent with this Court's interpretation of the remedial scheme (*Ruzicka and Community Nutrition Institute*), and denies due process if no retroactive refund is permitted (*McKesson, Reich and Harper, supra.*) In addition, there are numerous federal marketing orders operating in the United States that have mandatory assessments for advertising and promotion. Handlers are entitled to know whether the years of exhausting administrative remedies will lead to a refund if they prevail, or merely a hollow victory. If USDA knows that no refunds are permissible they can — and will, as they have done with the Almond Marketing Order — continue to assess for promotion and advertising, control the length of the administrative process, and when it loses, just simply "change" the rules and assess again.

In addition, members of this Court have indicated that it is time to re-examine the wisdom of the judge-made rule of sovereign immunity (*see, e.g. United States v. Nordic Village, Inc.*, 503 U.S. 30, 39-40 (1992); Stevens, J. dissenting) (and *see also, Block v. Neal*, 460 U.S. 289, 298 (1983) ("[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (citations omitted). Just last term, this Court in *United States v. Williams*, __ U.S. __, 115 S. Ct. 1611, 1618 (1995) construed a tax refund provision to allow the wife of the husband who was assessed the tax to sue for a refund against the government's claim of sovereign immunity and stated "the

government's strained reading of [the statute], we note, would leave people in Williams' position without a remedy." *Id. See also, Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) which, relying on suits against the federal government or officers, declared that money damages were available for Title IX violations even though Congress did not expressly provide for money damages, because of the courts traditional rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71. While acknowledging that *Franklin* did not involve the United States or its officers as defendants, the decisions cited by the court in tracing the "deep roots" of the rule all involved suits against the federal government or federal actors (*e.g. Bell v. Hood*, 327 U.S. 678. 684 (1946); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Dooley v. United States*, 182 U.S. 222, 229 (1901); and *Kendall v. United States ex rel. Stokes*, 37 U.S. (112 Pet.) 524 (1838). *Franklin* at 66-67, 74.

If this remedial scheme formulated by Congress through its enactment of § 608c(15) is intended to be complete to protect handlers, as this Court held in *Ruzicka*, there must be a "remedy" for the unconstitutional "obligation" imposed upon the handler; a refund in this case. This Court in *Harper* and *Reich, supra* declared the remedy must be retroactive. *Reich*, 115 S. Ct. at 551. Petitioners allege Congress gave such a remedy through § 608c(15) by stating that handlers could receive an "exemption" from an unlawful "obligation." An "exemption" from an assessment "obligation" must mean a refund, since there are no pre-deprivation remedies and handlers must comply while they complain. (*Ruzicka, supra*).

The Ninth Circuit's decision that a refund of assessments paid to third parties was money damages remedy barred by sovereign immunity, not a claim for equitable relief like

restitution, fails to recognize it was USDA that mandated the payment to these third parties, and therefore the money was spent on behalf of the government for the government's benefit. USDA treated the expenditures as the same (7 C.F.R. § 981.81(b)), and therefore it was not a suit for money damages at all but equitable relief, *i.e.*, recoupment or restitution. Since Congress in its enactment of § 608c(15)(A) allows handlers to challenge any "obligation" arising out of any marketing order, and since the expenditures to third parties for advertising and promotion were obligations, they were obligations that were unconstitutionally imposed and the assessments were unconstitutionally exacted and therefore sovereign immunity does not bar relief. (*United States v. Testan, id.*).

In addition, although raised by the Petitioners before the Ninth Circuit, the Ninth Circuit never addressed any of the alternative remedies sought by the Petitioners. Petitioners allege that it would not violate sovereign immunity if the remedy was that the Petitioners could receive credits towards future assessments (that were fully assignable or saleable), as that would not affect the treasury. The Ninth Circuit also did not address the fact that refund payments by the Almond Board would not imperil the treasury. Since § 608c(15) specifically gave handlers the right to sue, sovereign immunity does not bar refunds by the Almond Board, nor by Petitioners receiving credits against future assessments.

In this First Amendment context the exhaustion requirements of § 608c(15), and as construed by this Court in *Ruzicka*, already impose a substantial burden on protected First Amendment rights (*see Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306-309 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435, 444 (1984)) (even temporary payments infringing First Amendment rights are not tolerated), denying a refund when the Petitioners have complied with the exhaustion requirement not only adds

insult to injury but does not remedy the First Amendment violation — a result repugnant to this Court. (*McKesson, Harper, Reich, supra)* Also, in *Reynoldsville Casket Company v. Hyde*, __ U.S. __, 115 S. Ct. 1745 (1995) this Court held that the State of Ohio's refusal to treat this Court's Commerce Clause violation decision retroactively could not be countenanced because to apply it prospectively would still not eliminate the Commerce Clause violation and since there was a Commerce Clause violation, the remedy must be structured so as to eliminate the unlawful action. *Id.* at 1749. In a concurring opinion, Justice Scalia stated that a "law repugnant to the Constitution 'is void, and is as no law [citation.]' Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful and provides a remedy." *Id.* at 1752 (Scalia J. Concurring). In this case, the Ninth Circuit has not remedied the First Amendment violation. The government has received the benefit of the unconstitutional exaction imposed upon the Petitioners and sovereign immunity cannot bar a refund.

This Court should grant review to resolve the question of whether the refusal to provide a remedy in this case conflicts with congressional intent of § 608c(15), this Court's construction of that congressional intent in *Ruzicka*, whether the failure to provide a remedy in this case would violate due process when there is no pre-deprivation remedy available (*McKesson, Harper* and *Reich*) or whether payment from some fund other than the treasury avoids the sovereign immunity dilemma. There are a number of federal marketing order programs with similar schemes, the Almond Board's program is continuing with Petitioners again having to exhaust administrative remedies and only this Court can determine whether or not sovereign immunity bars a refund to remedy the unconstitutional exaction of assessments imposed upon the Petitioners for useless (to

Petitioners) advertising and promoting California almonds pursuant to the compulsion and restrictions of USDA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 20, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-17160, 94-17163, 94-17164,
94-17166, 94-17167, 94-17182

D.C. Nos. CV-91-0064-REC, CV-91-0122 REC,
CV-91-0123 REC, CV-91-0685-REC,
CV-92-5684-REC, and CV-86-0087-REC

CAL-ALMOND, INC., a California corporation; SAULSBURY ORCHARD AND ALMOND PROCESSING INC.; CARLSON FARM, a sole proprietorship,

Plaintiffs-Appellees,

v.

DEPARTMENT OF AGRICULTURE,

Defendant-Appellant.

ORDER

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Schroeder and Brunetti vote to reject the suggestion for a rehearing en banc and Judge Choy so recommends.

Appendix A

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED OCTOBER 10, 1995

CAL-ALMOND, INC., a California corporation; Saulsbury Orchard and Almond Processing Inc.; Carlson Farms, a sole proprietorship, Plaintiffs-Appellees,

v.

DEPARTMENT OF AGRICULTURE, Defendant-Appellant.

Nos. 94-17160, 94-17163, 94-17164, 94-17166, 94-17167 and 94-17182.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 11, 1995.

Decided Oct. 10, 1995.

* * *

Jeffrica Jenkins Lee, United States Department of Justice, Washington, DC, for defendant-appellant.

Brian C. Leighton, Clovis, California, for plaintiffs-appellees.

Appeals from the United States District Court for the Eastern District of California.

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

Appendix B

BRUNETTI, Circuit Judge:

In a previous appeal for these cases, we held that certain provisions of the California Almond Marketing Order (Order), 7 C.F.R. Sec. 981, violated the free speech and free association rights of several almond handlers. Cal-Almond, Inc. v. Department of Agriculture, 14 F.3d 429 (9th Cir.1993) (Cal-Almond I). We remanded the case to the district court to conduct the fact-intensive inquiry necessary to determine the appropriate remedy. On remand, the district court ordered the United States Department of Agriculture (USDA) to refund the full amount the almond handlers had paid to the Board since 1980, to release all of the advertising assessments that had been placed in escrow accounts, and to reimburse the almond handlers all of the money they spent on creditable advertising. The USDA appeals the propriety of the district court's award. We have jurisdiction, see 28 U.S.C. Sec. 1291, and we affirm in part and reverse in part.

I.

In our previous opinion, we held that certain provisions of the Order, which was issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. Sec. 601-674 (AMAA), to regulate the California almond-handling industry, violated the almond handlers' free speech and free association rights. Id. at 440. Specifically, we examined the Order's provisions that required almond handlers to contribute to a generic pro-almond public relations, advertising, and promotion program (Program). The Program, administered by the California Almond Board (Board), was funded by assessments collected from almond handlers on the basis of the volume of almonds handled. 7 C.F.R. Secs. 981.41(a), 981.81(a). The assessments could be reduced, at least

in part, by the amount a handler spent on creditable advertising and other promotional activities as provided in 7 C.F.R. Sec. 981.441(d)(1)(i)-(iii). In order to be approved by the Board, the promotional activity had to have as its "clear and evident purpose" the promotion of "the sale, consumption, or use of California almonds." 7 C.F.R. Sec. 981.441(e)(2).

In Cal-Almond I, we held that the Board's assessments implicated the almond handlers' First Amendment rights because the handlers, who constitute a "publicly identified group," were forced to fund the " 'dissemination of a particular message associated with that group.' " Cal-Almond I, 14 F.3d at 435 (quoting United States v. Frame, 885 F.2d 1119, 1132 (3rd Cir.1989), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990)). We found that the assessments implicated the handlers' rights to free speech and free association, regardless of whether the assessments were paid directly to the Board or satisfied by expenditures on creditable advertising and promotional activities. Id. Applying the three prong test from Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we concluded that the Almond Marketing Program violated the handlers' First Amendment rights. Cal-Almond I, 14 F.3d at 440. Consequently, we remanded to the district court the fact-intensive determination of the appropriate remedy. Id. at 449.

On remand, the parties stipulated regarding the various amounts that each handler paid to the Board for creditable advertising, that had been placed in escrow for payment of creditable advertising assessments, that had been paid to third parties (i.e., newspapers, magazines, etc.) for creditable advertising, and the portion of each handler's annual assessments that was applied toward the Board's generic

promotional activities. The district court ordered the USDA to refund approximately $135,000, which represents the full amount handlers paid to the Board since 1980, to release approximately $1.7 million of advertising assessments that had been placed in escrow accounts, and to reimburse the $2.5 million that they had paid third parties for creditable advertising. The USDA timely appeals this order.

II.

We first address whether the doctrine of sovereign immunity bars the reimbursement of money the handlers spent on creditable advertising ordered by the district court.[1] We review questions involving principles of sovereign immunity de novo. United States v. Woodley, 9 F.3d 774, 781 (9th Cir.1993).

It is well established that "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity. . . ." United States v. Testan, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976). It is also clear that waivers of sovereign immunity must be "unequivocally expressed." United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 112 S.Ct. 1011, 1014, 117 L.Ed.2d 181 (1992). Claims for specific relief, however, are not subject to sovereign immunity. Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 452 (9th Cir.1983). The question we must decide, therefore, is whether reimbursement of the money that the handlers paid for creditable advertising is best

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1. The USDA does not, and indeed could not, contend that refund of assessments paid to the Board would be damages and therefore barred by sovereign immunity. See Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1386 (9th Cir.1995).

characterized as damages, and thus barred by the doctrine of sovereign immunity, or as specific relief.

The distinction between money damages and specific monetary relief is that "[d]amages are given to the plaintiff to substitute for a suffered loss . . . . specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he is entitled.' " Maryland Dep't of Human Resources v. Department of HHS, 763 F.2d 1441, 1446 (D.C.Cir.1985) (quoting D. Dobbs, Handbook on the Law of Remedies 135 (1973)); see also Bowen v. Massachusetts, 487 U.S. 879, 914, 108 S.Ct. 2722, 2742, 101 L.Ed.2d 749 (Scalia, J., dissenting) ("Whereas damages compensate a plaintiff for a loss, specific relief prevents or undoes the loss — for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken. . . .").

Requiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige the USDA to "substitute" money from its coffers for money the handlers had paid to third parties. Unlike the assessments paid directly to the Board, in the situation of the money paid for creditable advertising, the USDA cannot return the "precise property wrongfully taken" because that money was not paid to the USDA. Reimbursement for the money handlers spent on creditable advertising would therefore constitute damages. Since nothing in the Act demonstrates congressional intent to waive sovereign immunity for the claims raised by the handlers, see Wileman, 58 F.3d at 1385, the handlers' claims for reimbursement for money spent on creditable advertising are barred by sovereign immunity.

The handlers cite several cases in which monetary remediation was not barred by sovereign immunity, arguing that

those cases compel the conclusion that reimbursement in this case would not constitute damages. See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 910, 108 S.Ct. 2722, 2740, 101 L.Ed.2d 749 (1988); Katz v. Cisneros, 16 F.3d 1204, 1208 (Fed.Cir.1994); Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 797 (Fed.Cir.1993); Zellous v. Broadhead Assoc., 906 F.2d 94 (3d Cir.1990). In those cases, however, the monetary awards were made to plaintiffs because they were statutorily entitled to amounts that had been wrongfully withheld, not to reimburse them for money spent. For example, in Zellous — the case primarily relied upon by the handlers and the district court — plaintiffs were tenants of a housing project whose rent was subsidized under federal law. Zellous, 906 F.2d at 95. The tenants claimed that the Department of Housing and Urban Development (HUD), together with the housing project's owners and managers, violated the Housing Act and associated federal regulations as well as the Administrative Procedure Act (APA) by failing to make timely adjustments in their utilities allowance. Id. As a consequence of these violations, the tenants did not receive from HUD money to which they were entitled under the Housing Act and they paid more in rent than they should have. Id.

At first glance, Zellous and the other cases on which the handlers rely, appear to resemble the situation in this case. Like this case, plaintiffs in Zellous paid money to third parties (i.e., private landlords). However, the plaintiffs in Zellous were not compensated for the money they were wrongfully forced to pay in excess rent. Instead, the court in Zellous " 'merely require[d] [HUD] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it [implemented timely utility allowance adjustments.]' " Id. at 99 (second and third alterations in original) (internal quotation marks omitted).

Appendix B

It is true the amount the Zellous plaintiffs paid to the landlords was equal to the amount wrongfully withheld, but that fact does not blur the distinction between the different theories of recovery. Had the plaintiffs in Zellous framed their request for relief as seeking recovery of money wrongfully paid, their recovery would have been barred by sovereign immunity. They avoided this problem by instead framing their claim as one seeking to have the government pay them money to which they were statutorily entitled. The coincidence that the two amounts (the amount of excess rent paid and the amount owed to plaintiffs by HUD) were the same does not change the fact that the Zellous plaintiffs had a separate remedial theory that did not seek compensation for money they paid in excess rent. The availability of an alternative remedial theory allowed them to avoid the roadblock that sovereign immunity otherwise would have presented. By contrast, no alternative theory exists in this case to entitle the handlers to recover moneys spent on creditable advertising.

The almond handlers also argue that the doctrine of the law of the case precludes us from addressing the appropriateness of the district court's order requiring reimbursement of money spent on creditable advertising. The law of the case doctrine requires that a decision rendered by an appellate court on a legal issue be followed in all subsequent proceedings in the same case. Waggoner v. Dallaire, 767 F.2d 589, 593 (9th Cir.1985), cert. denied 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 601 (1986). The almond handlers urge that we implicitly contemplated the reimbursement of the $2.5 million spent on creditable advertising in our decision in Cal-Almond I, and are therefore precluded from reconsidering it. To buttress their argument, the almond handlers point out that in Cal-Almond I, we found that the Order was unconstitutional regardless of whether the

handlers made direct payment to the Board or expended money on pre-approved advertising. This argument confuses the distinction between right and remedy.

In Cal-Almond I, we defined the First Amendment rights infringed by the Program. For the purpose of that analysis, it did not matter to whom the money was paid; it only mattered that the payments were coercive and required the handlers to fund dissemination of a particular message. However, when analyzing what remedies are available, it matters a great deal whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties because of the doctrine of sovereign immunity.

Our analysis regarding sovereign immunity leads us to a somewhat awkward result: although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations. Despite the celebrated dictum in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), in the law of modern constitutional remedies, not every right comes equipped with a guarantee of individual remediation for every violation of that right. As this case demonstrates, the doctrine of sovereign immunity provides a formidable limitation on the availability of individual remedies. While it is "[d]ecried as irrational and immoral by some, . . . criticized on historic grounds by others, . . . recognized by all to have little doctrinal coherence, the doctrine of sovereign immunity nonetheless retained the endorsement of the two institutions that matter — the Supreme Court and Congress." Interfirst Bank of Dallas, N.A. v. United States, 769 F.2d 299, 303 (5th Cir.1985), cert. denied, 475 U.S. 1081, 106 S.Ct. 1458, 89 L.Ed.2d 716 (1986). Under the doctrine of sovereign immunity, we are compelled to

conclude that the handlers' claims for reimbursement of the amounts they were wrongfully compelled to pay for creditable advertising is a right for which there is no individual remedy.

III.

We now turn to the USDA's argument that any refund to the almond handlers must be offset or reduced by the amount of benefit the handlers received from the Board's activities.

As a primary matter, the almond handlers assert that the USDA either waived, or should be estopped from asserting, its claim for offset of the refund. The almond handlers argue that the USDA waived its argument regarding offset because it did not raise the issue until we remanded the case for determination of the remedies. However, it was not until our remand that the specifics of fashioning remedial relief came into focus. The USDA did not waive its opportunity to raise the issue of offset by letting the determination of remedies occur without it. For this reason, the cases relied on by the handlers are distinguishable. In both Laffey v. Northwest Airlines, Inc., 740 F.2d 1071, 1089 (D.C.Cir.1984), cert. denied, 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985), and Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250-51 (D.C.Cir.1987), defendants failed to raise objections to courts' remedial determinations at the time those determinations were being made. In this case, the USDA did not waive its opportunity to raise the issue of offset.

Nor is it precluded by the doctrine of judicial estoppel. Judicial estoppel " 'is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial

process.' " Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1989) (quoting Religious Technology Ctr. v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)), cert. denied, 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991).

The almond handlers contend that the USDA previously conceded that the handlers would be entitled to receive a full refund if the assessments were found to have been wrongfully imposed. In support, the handlers refer us to the USDA brief for Cal-Almond I, in which the USDA stated, "[T]he AMAA, through its provisions for judicial review, provides handlers with an opportunity to recoup assessments found to have been wrongfully imposed." The almond handlers also cite the USDA's cross-motion for summary judgment in the original proceeding before the district court, in which the USDA stated, "The AMAA . . . provides handlers with an opportunity to recoup assessments found to have been wrongfully imposed." The handlers overstate the USDA's concessions. These statements merely indicate that the USDA acknowledges that a refund is available for wrongfully imposed assessments, not an admission that the handlers are entitled to a full refund. The USDA cannot be judicially estopped from arguing against a full refund.

The handlers' primary contention is that the law of the case precludes us from reviewing the question of whether the handlers' refund from the Board should be reduced. Whether an appellate court previously decided an issue of law, precluding the district court from reconsidering the same issue, is a mixed question of fact and law in which legal questions predominate. Cf. United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984). A mixed question of law and fact in which legal issues predominate is reviewed de novo. United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. (en banc)), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

Appendix B

The USDA contends that the law of the case doctrine does not preclude consideration of this issue because Cal-Almond I acknowledged that plaintiffs received some benefit from the unconstitutionally compelled advertising. Our prior acknowledgment that the handlers received some benefit from the coerced advertising, the USDA contends, implies that we did not intend for the handlers to be refunded all of the money they paid to the Board. This time it is the USDA who confuses right and remedy.

In applying the Central Hudson balancing test to determine whether the almond handlers' First Amendment right was violated, we weighed the benefit handlers derived from the coercive advertising. Cal-Almond I, 14 F.3d at 437-38. Once we applied the balancing test and determined that the assessments failed the balancing, however, we concluded that the entire amount of assessments spent in advertising were unconstitutional, not merely the portion that failed to advance the handlers' efforts to sell their almonds. Id. at 438. In other words, our consideration of the benefit to the handlers was for the purposes of analyzing the right, not the remedy.

In Cal-Almond I, we decided that "a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due." Id. at 448. Our decision was simply an application of existing law. "[T]his court, on several occasions, has suggested that a refund of improper assessments is the appropriate remedy for prevailing handlers." Wileman, 58 F.3d at 1385 (citing Cal-Almond I, 14 F.3d at 448; Riverbend Farms, 847 F.2d at 559; Navel Orange Admin. Comm., 722 F.2d at 452).

Despite the well established law in this area, and our

reliance on it in Cal-Almond I, the USDA attempts to have us consider the benefit to the handlers with respect to remedies by proffering a very novel argument. The USDA contends that unless we discount the handlers' refund by the amount by which they benefitted by the Board's unconstitutional conduct, they will be unjustly enriched. However, the USDA cannot point to, nor can we find, any case in which the theory of unjust enrichment has been relied upon in fashioning a constitutional remedy. The fact that the assessments may have conferred some benefit on the handlers does not change the fact that the entire amount of the assessments used for advertising was improper and, as we held in Cal-Almond I, that the handlers are entitled to refund of any improper assessments.

IV.

The USDA's final argument is that the district court erred by refusing to remand to the Secretary for creation of a supplemental administrative record. The USDA asserts that a remand is required by the AMAA, or in the alternative, by the doctrine of primary jurisdiction.

We review the district court's interpretation of the AMAA de novo. See Cf. Abedini v. INS, 971 F.2d 188, 190-91 (9th Cir.1992) (reviewing de novo the determination of purely legal questions regarding statutory requirements).

"Congress has provided a special procedure for ascertaining whether [a marketing] order is or is not in accordance with the law." United States v. Ruzicka, 329 U.S. 287, 294, 67 S.Ct. 207, 210, 91 L.Ed. 290 (1946). The AMAA gives handlers of agricultural commodities the express right to seek administrative review of "any [marketing] order or a provision

of such order or any obligation imposed in connection therewith." 7 U.S.C. Sec. 608c(15)(A). A handler contending that such a provision is "not in accordance with law" is entitled to a hearing on that question before the agency and a ruling by the Secretary, id., and the remedy must be sought from the Secretary in the first instance. Ruzicka, 329 U.S. at 294, 67 S.Ct. at 210. The Secretary's final ruling is then reviewable by a district court. 7 U.S.C. Sec. 608c(15)(B). "If the court determines that [a] ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." Id.

This scheme has been complied with in this case. The handlers filed administrative petitions pursuant to 7 U.S.C. Sec. 608c(15)(A). Cal-Almond I, 14 F.3d at 434. Following hearings, USDA administrative law judges issued decisions, which were appealed to USDA Judicial Officers. After the Judicial Officers rendered their decisions, the handlers brought their claims to the district court. This is all the Act requires.

The USDA nevertheless contends that the district court erred by refusing to remand to the Secretary for creation of a supplemental administrative record. There is no reason to remand to the USDA for determination of the scope of the remedy. To the contrary, we have held on numerous occasions, including the prior appeal in this case, that an appropriate remedy for handlers who prevail in their administrative petitions is a refund of assessments wrongfully paid. See Cal-Almond I, 14 F.3d at 448; United States v. Riverbend Farms, 847 F.2d 553, 559 (9th Cir.1988) ("If the Secretary or courts (upon proper appeal) substantiated the challenge, the handler would be

entitled to a refund."). The parties here stipulated regarding all relevant amounts. Since a determination of the remedy flows directly from our decision in Cal-Almond I and the parties' stipulation, there is no need to remand to the Secretary. The district court did not err by declining to remand the issue of remedies to the Secretary.

In the alternative, the USDA argues that the doctrine of primary jurisdiction requires a remand. The doctrine of primary jurisdiction allows courts to exercise their discretion to route certain issues for a threshold decision to the supervising agency of a particular industry. United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987). Four common factors are considered when determining whether to invoke the doctrine of primary jurisdiction: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." Id. at 1362.

It is true that "Congress channeled disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them." Block v. Community Nutrition Inst., 467 U.S. 340, 347, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984). However, the remedies in this case do not involve "technical questions of fact uniquely within the expertise and experience of [the USDA]. . . ." Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643 (1976), superseded by statute (on another ground) as stated in, Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir.), cert. denied, 498 U.S. 926, 111 S.Ct. 307, 112

L.Ed.2d 261 (1990). Nor do they require complicated calculations that require the expertise of the Secretary. We therefore find that the district court did not abuse its discretion by declining to invoke the doctrine of primary jurisdiction.

V.

Before closing, we note that a wide cross-section of the almond industry, including other handlers not directly involved in this appeal ("Amici"), filed an amicus brief requesting that we not only determine the scope of the remedies to which the handlers are entitled, but also the means by which the USDA should satisfy the judgment. Amici argue that the appropriate source from which the judgment against the USDA should be satisfied is the Judgment Fund, pursuant to 28 U.S.C. Sec. 2414. Amici contend that if the judgment is satisfied either by imposing a supplemental assessment on the industry or by taking money from the reserve fund created pursuant to 7 C.F.R. Sec. 981.81(c), their First and Fifth Amendment rights would be violated. None of Amici's constitutional claims are ripe and we therefore do not consider them.

Although we have held that remand to the Secretary is unnecessary for determination of the scope of the remedy, it is the province of the USDA to determine how a judgment against it should be satisfied. Certainly if Amici believe that the USDA has chosen an unconstitutional method, Amici can challenge this action before the USDA.

VI.

The handlers request an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. Sec. 2412. Attorney's fees are not appropriate in this case because, even though it did

not prevail on all of its claims, the USDA brought a justified appeal from the district court's decision. We also find that the handlers are not entitled to post-judgment interest pursuant to 28 U.S.C. Sec. 1961.

VII.

The district court's decision that the USDA refund the full amount the almond handlers had paid to the Board since 1980 is affirmed. There is no offset for the Board's claim of unjust enrichment. The almond handlers have a right to reimbursement for payment to third parties for creditable advertising, but there is no individual remedy for these violations. Therefore, the district court's decision that the USDA reimburse the $2.5 million that had been paid to third parties for creditable advertising is reversed. We affirm the district court's refusal to remand the issue of remedies to the Secretary for supplemental administrative record, or failure to invoke the doctrine of primary jurisdiction.

AFFIRMED in part, REVERSED in part.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED DECEMBER 22, 1993

CAL-ALMOND, INC., a California corporation, Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Saulsbury Orchard and Almond Processing, Inc., Carlson Farms, a sole proprietorship, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Gourmet Packing Co., a California corporation, Gold Hills Nut Co., Inc., a California corporation, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Gold Hills Nut Co., Inc., a California corporation, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

Nos. 92-16033, 92-16034, 92-16031 and 92-16527.
United States Court of Appeals,
Ninth Circuit.

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Argued and Submitted Jan. 12, 1993.
Decided Dec. 22, 1993.

* * *

Brian C. Leighton, Clovis, CA, for plaintiffs-appellants.

Jeffrica Lee, U.S. Dept. of Justice, Washington, DC, for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

Two groups of almond handlers are challenging various provisions of the California Almond Marketing Order, which regulates the California almond handling industry. Both groups challenge the United States Department of Agriculture ("USDA") almond marketing program administered by the California Almond Board (the "Board"). The first group is also separately challenging the assessment imposition procedure used by the Board from 1980 to 1986. The second group is separately challenging the validity of the reserve requirement rules for the crop years 1988-89 and 1990-91. The district court affirmed a USDA Judicial Officer decision upholding the Almond Marketing Order against these challenges, and the handlers appeal. We affirm the district court's decision on the assessment imposition procedure and the reserve requirement rules, but hold that the marketing program violates appellants'

Appendix C

First Amendment rights to freedom of expression and association.

I. THE ALMOND MARKETING PROGRAM

A. Facts and proceedings below.

Appellants Cal-Almond, Saulsbury Orchards, and Carlson Farms are "handlers" of California almonds. They receive almonds from growers, process them, and sell the resulting product, primarily for use as ingredients in candy, ice cream, and cereal. Cal-Almond and Saulsbury also operate mail-order businesses through which they sell whole almonds.

The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. Sec. 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. Sec. 608c (the "Act"). The purpose of the Act is to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. Secs. 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity fo hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. Sec. 608c(4) (1988).

The Order is administered by the Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. Sec. 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of

activities, including research and development, marketing, quality control, and volume regulation. The Act specifically provides that the Order may establish "marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. Sec. 608c(6)(I) (1988). Pursuant to this authorization, the Board funds a generic pro-almond public relations program, consisting of such items as newspaper inserts containing almond recipes, leaflets and magazine articles about the benefits of almonds, promotional materials for school lunch programs, and press kits for industrial customers.

The money to pay for the Board's activities, including the marketing program, comes from assessments collected from handlers, based on the volume of almonds they handle. However, the Act and the Order provide that a handler's assessment will be reduced, up to a point,[1] by the amount that the handler spends on authorized advertising.[2] Before a handler can receive credit for his marketing promotion expenditures, the Board must determine that such expenditures meet the requirements of the "creditable advertising regulations" set forth in 7 C.F.R. Sec. 981.441.

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1. A handler may receive credit against his assessment in an amount not to exceed "that portion of his assessment designated for marketing promotion including paid advertising." 7 C.F.R. Sec. 981.41(c) (1993). For example, for the 1986-87 crop year, the overall assessment was 2.6cents per pound, and the maximum credit was 2.5cents per pound.

2. The Act provides that handlers may receive credit "for such marketing promotion including paid advertising as may be authorized by the [O]rder." 7 U.S.C. Sec. 608c(6)(I) (1988). The Order authorizes the Board, with the approval of the Secretary, to provide "for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products, or their uses." 7 C.F.R. Sec. 981.41(c) (1993).

The Order thus establishes an overall almond marketing program, which combines generic almond promotion conducted by the Board with Board-approved handler advertising. Beginning in 1984, appellant Saulsbury, which strongly opposed this program, refused to pay its annual assessments to the Board. In 1986, the United States sought an injunction in federal district court, pursuant to 7 U.S.C. Sec. 608a(6), to compel payment of some $300,000 in assessments which Saulsbury allegedly owed and had not paid to the Board. Saulsbury Orchards and Almond Processing, Inc. v. Yeutter, 917 F.2d 1190, 1193 (9th Cir. 1990). The district court granted summary judgment in favor of the government, and ordered Saulsbury to comply with the Order and pay the assessments. Id. The court refused to entertain Saulsbury's affirmative First Amendment defenses because it found that Saulsbury had not exhausted its administrative remedies pursuant to 7 U.S.C. Sec. 608c(15)(A).

In April 1987, Saulsbury, joined by appellants Cal-Almond and Carlson Farms, filed an administrative petition, pursuant to 7 U.S.C. Sec. 608c(15)(A), challenging numerous parts of the Order (including the almond marketing program) for the crop years 1980-87.[3] Following a hearing in the summer of 1989, a USDA administrative law judge ("ALJ") issued a decision on June 22, 1990 upholding some of appellants' challenges but rejecting others, including the challenge to the marketing program. Both sides appealed the ALJ's decision to the USDA Judicial Officer ("JO"). On January 23, 1991, the JO upheld the Order in all respects.

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3. Saulsbury, believing that it would suffer irreparable injury if it were forced to exhaust its administrative remedies, also filed a complaint in district court, again alleging that the Order was unconstitutional. The district court again dismissed the action on the ground that Saulsbury had failed to exhaust its administrative remedies. Saulsbury, 917 F.2d at 1193. We affirmed the dismissal in Saulsbury. Id. at 1197.

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Meanwhile, Cal-Almond had filed another petition pursuant to 7 U.S.C. Sec. 608c(15)(A), challenging a specific section of the creditable advertising regulations, 7 C.F.R. Sec. 981.441(c)(2), for the crop year 1988. The ALJ upheld the challenge, but his decision was reversed by the JO. The two petitions were consolidated for cross-motions for summary judgment to the district court. On June 3, 1992, the district court issued an order upholding the JO's decisions in their entirety. Appellants appeal this order.

B. Standard of review.

We review de novo a district court's grant of summary judgment. T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir.1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir.1989).

C. Discussion.

1. Infringement on appellants' First Amendment rights.

The district court held that the almond marketing program did not even implicate, let alone violate, appellants' First Amendment rights, "because plaintiffs are not 'compelled' to advertise." However, while the Order clearly does not compel appellants to advertise, it does compel them to expend a certain sum of money every year, on either assessments or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

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Assume first that the creditable advertising regulations did not exist and that handlers paid the full amount of their assessment to the Board. A substantial portion of that amount would be used by the Board for the generic almond promotion program, which infringes on appellants' First Amendment right to be free from compelled speech and association. See United States v. Frame, 885 F.2d 1119 (3d Cir.1989), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). Frame involved a First Amendment challenge to the Beef Promotion and Research Order, 7 C.F.R. Secs. 1260.101-.217, promulgated by USDA pursuant to the Beef Promotion and Research Act, 7 U.S.C. Secs. 2901-11. The Beef Promotion Order established a "Cattlemen's Board," whose goal would be to increase beef sales, and authorized it to collect an assessment of $1.00 per head of cattle from cattle producers and importers. Id. at 1122-23. Frame, a cattle breeder and auctioneer, refused to pay the assessment, and, when sued by the federal government, asserted that the Beef Promotion Act violated his First Amendment rights of free association and free speech. Id. at 1129.

The Third Circuit noted first that citizens arguably do not have the right to refuse to support financially government programs that involve speech they find objectionable. Id. at 1131. However, the court also found that the promotional expression sponsored by the Cattlemen's Board could not properly be characterized as "government speech"

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates

> money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes ... This sort of funding scheme [establishes a] close nexus between the individual and the message funded.

Id. at 1132 (citations omitted) (emphasis added). The court found that the Beef Promotion Act implicated Frame's First Amendment rights because it resembled other funding schemes that the Supreme Court had held to implicate individuals' First Amendment rights. Id. at 1132-33, citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (union-management agency shop agreements, which require that every employee pay the union a service charge equal in amount to union dues, impinge on employees' rights to be free from compelled affirmation of belief and compelled association for expressive purposes) and Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state law requiring citizens to bear state slogan, "Live Free or Die," on automobile license plates, implicates First Amendment rights because law requires individuals to participate in the dissemination of an ideological message).

The Board's almond promotion program closely resembles the beef promotion program at issue in Frame. In both cases, a

"publicly identified group" (cattlemen or almond handlers) must contribute money to fund the "dissemination of a particular message associated with that group." For the same reason that the beef program implicated Frame's First Amendment right to be free from compelled speech and association, then, the Board's promotional efforts implicate appellants'.

Assume next that the Order imposed on handlers no assessment or other compelled contribution to the Board whatsoever, but only required that they spend the equivalent sum every year on advertising that met the requirements of 7 C.F.R. Sec. 981.441. Such an Order also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech. See Wooley, 430 U.S. at 714, 97 S.Ct. at 1435 ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Thus, both an assessment-only program and an advertising-only program would implicate appellants' First Amendment rights. Because the Order is a combination of both, it implicates those rights as well. USDA's argument that the creditable advertising regulations do not implicate those rights because they do not "compel" appellants to advertise ignores the fact that if handlers do not advertise according to the regulations, they must contribute their assessment to the Board,[4] which is itself a

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4. Handlers may also earn credits by engaging in other promotional activities, such as distributing sample packages of almonds to charitable or educational outlets, purchasing promotional materials available from the Board, or certain direct mail promotions. 7 C.F.R. 981.441(d)(1)(i)-(iii) (1993). The availability of such options does not change the First Amendment analysis;

(Cont'd)

type of compulsion implicating appellants' First Amendment rights.

2. Type of speech restricted.

Having determined that the almond marketing program implicates appellants' First Amendment rights, we must now select the proper standard to evaluate the constitutionality of the program. Appellants claim, and we agree, that the program infringes on both their right to free speech and their right to free association. The Supreme Court has established different tests for each of these. Restrictions on lawful and non-misleading commercial speech[5] are evaluated using the three-prong standard of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). First, the asserted government interest behind the restrictions must be "substantial." Id. at 566, 100 S.Ct. at 2351. Second, the restrictions must "directly advance[ ] the governmental interest asserted." Id. Third, the restrictions must be "not more extensive than is necessary to serve that interest." Id.

(Cont'd)
they simply represent other types of expressive activity the only alternative to which is the compelled assessment. In practice, the "vast majority" of creditable advertising expenditures are spent on advertisements and not on these alternatives.

5. "Commercial speech" is that which "propose[s] a commercial transaction." Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986) (quotation omitted). All of the promotional efforts undertaken by the Board, whether directly (through its own activities) or indirectly (through the inducements of the creditable advertising regulations), are aimed at increasing almond sales. The program therefore deals with commercial speech.

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Government programs that compel association are evaluated under a more stringent standard. The Supreme Court has recognized that "[f]reedom of association . . . plainly presupposes a freedom not to associate." Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). See also IDK, Inc. v. Clark County, 836 F.2d 1185, 1192 (9th Cir.1988) ("[t]he first amendment . . . gives us the freedom not to assemble with those whose goals we do not share."). In Roberts, the Supreme Court held that infringements on the right of free association must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Roberts, 468 U.S. at 623, 104 S.Ct. at 3252. The Frame majority applied this test to the Beef Promotion Act. See Frame, 885 F.2d at 1134. However, because we hold the almond marketing program unconstitutional even under the less stringent Central Hudson standard, we do not decide which of these two should apply. See id. at 1146 (Sloviter, J., dissenting).

Appellants contend that their own almond advertising contains a mixture of commercial and political speech and is therefore entitled to a higher level of protection under Riley v. National Fed'n of Blind, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Riley addressed a First Amendment challenge to a North Carolina requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. Id. at 795, 108 S.Ct. at 2676-77. The Supreme Court found the regulation unconstitutional under strict scrutiny. Id. at 798, 108 S.Ct. at 2678. The Court applied strict scrutiny because although the speech at issue was arguably commercial, and thus

subject to a more deferential standard of review, "the speech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech" — in that case, charitable solicitation. Id. at 796, 108 S.Ct. at 2677 (emphasis added).

In the present case, however, the commercial speech, although arguably "compelled," is not inextricably intertwined with higher-value noncommercial speech. Appellants' political appeals are not essential components of their advertisements. "[A]dvertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n. 7, 105 S.Ct. 2265, 2274 n. 7, 85 L.Ed.2d 652 (quotation omitted). Thus, the Riley rationale for applying strict scrutiny is not present here.

3. Application of the Central Hudson test.

Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. Edenfield v. Fane, __ U.S. __, __, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

(a) Substantial government interest.

We "must identify with care the interests the State itself asserts." Edenfield, at __, 113 S.Ct. at 1798. USDA claims that

the government has a "compelling and important interest in promoting the consumption of almonds" in order to "provide for greater stability in the products of agriculture" and "protect the income of farmers." Brief for the Appellee at 32. The Act itself states that the purpose of the creditable advertising program is to "assist, improve, or promote the marketing, distribution, and consumption of [almonds]." 7 U.S.C. Sec. 608c(6)(I) (1988). See also 36 Fed.Reg. 20,887, 20,888 (1971) (the program will "provide an additional method of stimulating almond consumption"); 35 Fed.Reg. 7428, 7432 (1970) (the program will provide the "opportunity to stimulate the demand for almonds"). We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest. See Frame, 885 F.2d at 1134 (government has a compelling interest in "maintaining and expanding beef markets" in order to "prevent[ ] further decay of an already deteriorating beef industry).

(b) Direct advancement of the interest.

Next, USDA must show that the program "directly advances the governmental interest asserted." Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. "[T]he regulation[s] may not be sustained if [they] provide[ ] only ineffective or remote support for the government's purpose." Id. at 564, 100 S.Ct. at 2350. Furthermore, we may not simply defer to legislative and executive judgment on this question; we must determine ourselves whether the program directly advances USDA's asserted interests. City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n. 22, 104 S.Ct. 2118, 2127 n. 22, 80 L.Ed.2d 772 (1984). We apply this test first to the creditable advertising regulations specifically, and then to the overall almond promotion program.

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Because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, USDA must show both that the advertising for which credit is granted is better at selling almonds than the Board's own efforts and that the advertising for which credit is denied is worse at selling almonds than the Board's own efforts. As a starting point for our analysis, therefore, we must determine how effective the Board's own almond promotion efforts are. USDA has presented little solid evidence on this question. The following exchange, which occurred at the hearing before the ALJ between counsel for Cal-Almond and Skip Hubbard, chairman of the Board's Public Relations and Advertising Committee, is highly instructive:

> Q: [H]as the Public Relations and Advertising Committee since you have been chairman, ever hired somebody to analyze whether or not the creditable advertising rules and the assessment amount spent on advertising, have caused more sales of almonds?
>
> A: It has not been—we have not ha[d] a survey conducted.
>
> Q: So would it be safe to say that you don't have any empirical data as to whether or not the advertising assessments have assisted in the ... sale and consumption of almonds?
>
> A: No study has been made on that.
>
> Q: Has any study been made as to whether

> or not certain provisions of section 981.441 have created more sales or less sales than other provisions? A: We have not commissioned any study for that. [. . .]
>
> Q: [. . .] Has the Almond Board, the Public Relations and Advertising Committee, ever made a determination as to whether or not the advertising itself, or the promotion itself, done by the Board has increased grower returns?
>
> A: The Committee believes that the promotional activities are beneficial to grower returns.
>
> Q: [. . .] Has any study been conducted?
>
> A: No.

Transcript of 1/25/90 hearing before USDA ALJ Hunt at 158-60.[6] Because USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[7] See Edenfield, __

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6. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that a professor at the University of California-Davis had conducted a study whose results demonstrated that the advertising program had been successful in increasing grower returns. However, this study is not part of the record.

7. USDA asserts that creditable advertising may "reasonably be expected

(Cont'd)

U.S. at __, 113 S.Ct. at 1800 (Florida Board of Accountancy fails to justify ban on personal solicitation of prospective business clients by accountants when it provides no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching, or compromised independence).

In fact, most of the evidence in the record indicates that the regulations hinder the handlers' efforts to increase sales and returns to growers. For example, most of appellant Saulsbury's sales were to cereal companies, but Saulsbury could not receive credit for advertising the cereals containing its almonds because the regulations deny credit for products that do not contain at least 50 percent raw shelled almonds by weight and do not display the handler's brand. See 7 C.F.R. Sec. 981.441(c)(3)(iv). When a chain of mini-markets in the Boise, Idaho area agreed to carry Saulsbury almonds, Saulsbury could not receive credit for advertisements directing consumers to those stores because the regulations deny credit for advertisements directing consumers to retail outlets not "operated" by a handler. See 7 C.F.R. Sec. 981.441(c)(5)(iii). Because of these restrictions, Saulsbury estimated that every dollar spent on creditable advertising returned less than fifty cents in sales.

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to increase the sale of almonds," Brief for the Appellee at 31, and cites to the rule-making records underlying the regulations to support its assertion. However, these records address only minor amendments to the regulations made during the past decade, and not to the initial adoption of the bulk of the regulations, including the most restrictive ones. See, e.g., 49 Fed.Reg. 19,978 (May 10, 1984) (increasing the amount of credit handlers receive for advertising almond butter); 50 Fed.Reg. 16,451 (April 26, 1985) (doubling the portion of creditable advertising that may be carried over from one crop year to the next); 52 Fed.Reg. 13,427 (April 23, 1987) (allowing credit for the cost of purchasing mailing lists, envelopes and postage used in mail order promotions).

Appendix C

Cal-Almond's experience with the regulations was similarly disappointing. Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items, and nearly all of the almonds it sells domestically are used in ice cream. However, like Saulsbury and cereal, Cal-Almond cannot obtain credit for advertising this ice cream because the regulations forbid it. The only creditable advertising of any use to Cal-Almond is that promoting its mail order business, which is not a profitable undertaking.[8] Overall, the evidence indicates that the regulations hinder, rather than help, appellants' efforts to sell their almonds.

Finally, there is no evidence that the regulations stimulate additional or more effective advertising from other handlers. Blue Diamond is by far the largest handler and overwhelmingly dominates the retail market;[9] to "directly advance" the government interest in increasing almond sales, the regulations would have to give Blue Diamond an incentive to advertise more. The record indicates, however, that they do not. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that Blue Diamond would "probably" continue to spend just as much money advertising even if the regulations did not exist. Walter Payne, Blue Diamond's vice president for sales, marketing and distribution, testified that Blue Diamond would advertise the same amount and in the same manner in the absence of the regulations.

In sum, the record indicates that the regulations do not

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8. For example, in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000.

9. As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.

stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellants' First Amendment rights.

Whether the entire assessment-funded almond promotion program "directly advances" the governmental interests in increased almond sales and returns to growers is a more difficult question. The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised. See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("[w]e think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); Central Hudson, 447 U.S. at 569, 100 S.Ct. at 2353 ("[t]here is an immediate connection between advertising and demand for electricity."). Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand (although, as noted above, the Board does not know how significant the effect is).

However, because these efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing. USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the

specific, targeted marketing efforts of individual handlers.[10] We agree with appellants' argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[11]

(c) Not more extensive than necessary.

USDA must prove that the regulations are no more extensive than necessary to serve the interest of increasing almond sales. The Supreme Court held in Board of Trustees of State Univ. v. Fox that this standard is not as strict as a "least restrictive means" test:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends — a fit that is not

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10. Once again, appellants have presented evidence to the contrary. Cloyd Angle, the president of Cal-Almond, testified that the best way for him to sell almonds is to bring potential customers to his plant and show them the cleanliness and efficiency of his processing facilities. Spending money on generic Board promotion does not help him do this.

11. The Frame majority held that mandatory assessments to the Cattlemen's Board advanced the goals of the Beef Promotion Act because they "prevent[ed] 'free riders' from receiving the benefits of the promotion and research program without sharing the cost." Frame, 885 F.2d at 1135. USDA could make a similar argument here (although it has not). Such a conclusion, however, presumes that the promotion itself advances the goals of the Act, a presumption that we have rejected.

> necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989).

USDA asserts that "[a]lthough it is possible that some forms of advertising, though ineligible for credit, might also increase the sale of almonds, the regulations reflect a reasonable judgment that the Board will make better use of those monies in its market promotion programs." However, once again, USDA offers no evidence in support of this "reasonable judgment." It certainly seems reasonable to assume that the advertisements for which credit is explicitly permitted—generic advertisements, expenditures for advertisements announcing future promotion activities, and in-store supermarket advertisements—will increase almond sales. However, USDA offers no justifications for the restrictions that deny credit for certain advertisements: ads promoting more than two complementary branded products (Sec. 981.441(c)(5)(i)), ads promoting a product that also has "competing nuts" (Sec. 981.441(c)(5)(ii)), or ads promoting retail stores not owned by handlers (Sec. 981.441(c)(5)(iii)). It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted Fox as holding that "restrictions which

disregard far less restrictive and more precise means are not narrowly tailored." Project 80's, Inc. v. City of Pocatello, 942 F.2d 635, 638 (9th Cir.1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales. As the USDA has failed to present sufficient evidence to satisfy the requirements of the Central Hudson test, the Almond Marketing Program violates appellants First Amendment rights.

II. THE ASSESSMENT IMPOSITION PROCEDURES

A. Facts and proceedings below.

As noted above, the funds required to finance the Board's activities are generated through assessments authorized by the Act. The Order specifically provides that the assessment shall be "such rate per pound of almonds . . . received by [the handler] for his own account . . . as the Secretary finds is necessary to provide funds to meet the authorized [B]oard expenses and the operating reserve requirements." 7 C.F.R. Sec. 981.81(a) (1993).

For the crop years 1980 through 1986, USDA issued final rules containing budget estimates and assessment rates without first publishing a proposed rule and requesting comments. Appellants contend that this procedure violated the rule making requirements of the Administrative Procedure Act (APA), which requires "[g]eneral notice of proposed rule making . . . unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. Sec. 553(b) (1988) (the "notice" requirement). The agency is also required to give "interested persons an opportunity to participate in the rule making" (the "comment" requirement) and "[a]fter

consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. Sec. 553(c) (1988). In addition to the time required for the notice-and-comment procedure, an additional thirty days must pass between the time the final rule is passed and the time it takes effect. 5 U.S.C. Sec. 553(d) (1988).

Following appellants' administrative challenges to the assessment imposition procedure,[12] the ALJ found that notice and comment pursuant to the APA should have been allowed. The JO disagreed and ruled that "good cause" existed for dispensing with notice and comment because the Secretary had discretion to authorize such expenses as were reasonable and likely to be incurred and because arriving at the assessment rate was a ministerial and mechanical calculation. The district court agreed with the JO.

B. Discussion.

1. Notice and comment.

We review de novo "the district court's determinations on issues of statutory interpretation, including the scope of the notice-and-comment and publication requirements imposed by the APA." Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1011 (9th Cir.1987). We hold that although the assessments are "rules" subject to the notice-and-comment requirement of the APA, the Secretary's failure to give notice and request comments was harmless.

The APA defines a "rule" as

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12. Outlined in section I.A. above.

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates.

5 U.S.C. Sec. 551(4) (1988) (emphasis added). We agree with appellants that establishing an assessment is a "prescription for the future of rates." The Order itself defines the assessment as a "rate per pound of almonds." 7 C.F.R. Sec. 981.81(a) (1993). USDA's argument that the assessment procedure is not a rule because it is simply the mechanical result of the Secretary's approving an agency's budget fails under the D.C. Circuit's opinion in Batterton v. Marshall, 648 F.2d 694 (D.C.Cir.1980). There, the court held that the exemption for budgetary approval does not apply "where the agency action trenches on substantial private rights and interests." Id. at 708 (footnote omitted). Because the assessment rate directly affects the financial interests of appellants and other almond handlers, it is not exempt from the notice-and-comment requirements of the APA.

The district court held that the Secretary's failure to follow the notice-and-comment procedure was excused by the "good cause" exception to the APA, which excuses such failure

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons thereof in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. Sec. 553(b)(B) (1988) (emphasis added). The announcement accompanying the rules provided the following justification for dispensing with the notice-and-comment procedure:

> To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expense and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the [A]ct it is necessary to make these provisions effective as specified.

45 Fed.Reg. 56,794 (1980). USDA contends that since the Board's annual harvest forecast and proposed budget both depend on crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA.[13]

We disagree, based on our opinion in Riverbend Farms Inc. v. Madigan, 958 F.2d 1479 (9th Cir.), cert. denied, __ U.S. __, 113 S.Ct. 598, 121 L.Ed.2d 535 (1992). In Riverbend Farms, handlers of navel oranges challenged the procedure used by the Secretary to set weekly volume restrictions on the marketing of the oranges. We first noted that

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13. The Board recommended assessment rates at the annual July meeting. However, in the years from 1980 to 1986, the earliest the Secretary issued the final rule was August 26 in 1980, and the latest was October 19 in 1982.

> the good cause exception goes only as far as its name implies: It authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with the APA by complying with those APA requirements it is capable of complying with.

Id. at 1485. We then held that even though the volume-setting meetings were conducted weekly, the Secretary had no reason not to give notice of them (by means of publication in the Federal Register) or allow written comments before promulgating weekly volume restrictions. Id. at 1486. Because we found no reason in Riverbend Farms to depart from the notice-and-comment procedure for weekly meetings and rules, we can discern no good cause here for the Secretary's failure to follow the procedure for annual meetings and rules.

We also cannot find good cause for the failure to wait thirty days before allowing the rule to take effect. In Riverbend Farms, we noted two reasons for the waiting period: it gives affected parties time to adjust their behavior before the final rule takes effect, and it usually causes no harm. Id. at 1485. These reasons apply to the almonds context. From 1980 to 1986, delaying the effective date of the rules by thirty days would have caused no harm, because the Secretary always waited at least thirty days before adopting a final rule anyway. Furthermore, the thirty days would have given handlers an opportunity to estimate their future costs and prices before the rule went into effect. Therefore, we can see no reason not to follow this requirement, and hold that the Secretary has failed to provide good cause for his failure to follow the procedure mandated by the APA.

However, we find this failure to be harmless. "We have held that the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.' " Riverbend Farms, 958 F.2d at 1487 (quoting Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir.1986)). Our harmless error analysis "must therefore focus on the process as well as the result." Id. (emphasis added). In Riverbend Farms, we ultimately concluded that the Secretary's failure to comply with the APA's notice-and-comment requirements in promulgating the weekly navel orange volume restrictions was harmless because the handlers knew that there would be meetings every Tuesday, that proposed restrictions would be contained in a position paper issued prior to the meetings, and that the meetings would provide the opportunity for public comment. Therefore, the handlers were not prejudiced by the Secretary's failure to follow the notice and comment procedure, and the error was harmless. Id. at 1488.

The Secretary's error in the instant case is harmless for the same reasons. The Board holds open meetings in July of each year to gather information relevant to estimating its budget and the resulting assessment rate. During these meetings, the Board receives comments and testimony from any and all interested parties. After deciding on its recommendations, the Board directly notifies each almond handler of the proposed assessment rate. The Board then submits its recommendations to the Secretary for approval; from 1980 to 1986, the assessment rate set by the Secretary in the final rule was the same as the rate that had been recommended by the Board. Therefore, under Riverbend Farms, any error made by the Secretary in not following the notice and comment procedure was harmless.

Appendix C

2. Validity of allegedly "retroactive" assessments.

From 1980 to 1986, the final rules establishing the annual assessments were not issued by the Secretary until at least several weeks after the beginning of the crop year. However, appellants had by that time already received a significant quantity of almonds, and the assessments were applied to those almonds as well. Appellants claim that doing so transformed the assessments into impermissible "retroactive" rules.

The Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 217, 109 S.Ct. 468, 476, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring). "Retroactive" rules—those that alter the past legal status of past actions—are "not favored in the law." Id. at 208, 109 S.Ct. at 471. However, they are permitted if the power to promulgate them "is conveyed by Congress in express terms." Id. (emphasis added).

We agree with the district court that even if the assessments are retroactive rules, Congress expressly granted the Secretary the power to promulgate them. The Act provides that handlers shall pay assessments for such expenses "as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him." 7 U.S.C. Sec. 610(b)(2)(ii) (1988). Since the Order specifies the crop year to be the relevant "period," the Secretary may impose the assessment on all almonds received during that time. As the district court pointed out,

> [t]he statutory language of Section 610(b)(2)(ii) mandates that each handler's pro rata share of the Almond Board's

> expenses must be based on the volume of all of the commodity covered by the marketing order. The focus of the statute is on the 'expenses likely to be incurred . . . during any period specified by [the Secretary].' The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year.

We hold that even if the assessment rules are "retroactive," they are permissible because they were authorized by Congress in the Act.

3. Statement of basis and purpose.

Appellants contend that the final 1980-1986 assessment rules failed to comply with the substantive requirements of the APA because they did not include a "general statement of their basis and purpose" as required by 5 U.S.C. Sec. 553(c). However, regulations with no statement of basis and purpose have been upheld where the basis and purpose was considered obvious. See Citizens to Save Spencer County v. E.P.A., 600 F.2d 844, 884 (D.C.Cir.1979). This is just such a case. The "purpose" of the assessment is clearly to fund the Board's operations, and the "basis" of the rate is the mechanical application of the statutory formula. Because the basis and purpose of the assessment rate are obvious, no express statement was necessary to comply with the APA.

Appendix C

III. THE RESERVE REQUIREMENTS

A. Facts and proceedings below.

The reserve requirement is the mechanism the Board uses to regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C. Sec. 608c(6)(A), (C) (1988). Every year, the Board recommends to the Secretary what percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. Sec. 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. Sec. 981.50 (1993). The Secretary designates the final percentage based on the Board's recommendation and "any other available information." 7 C.F.R. Sec. 981.47 (1993).

The almond crop year begins on July 1 and ends June 30. 7 C.F.R. Sec. 981.19 (1993). For the 1988 crop year, the Board recommended a 25 percent reserve requirement on July 20, 1988; the Secretary issued a proposed rule incorporating this recommendation on September 16, 1988, allowing 15 days for comment; and issued the final rule establishing the 25 percent reserve requirement on January 25, 1989. For the 1990-91 crop year, the Board recommended a 35 percent reserve requirement; the Secretary issued a proposed rule on August 10, 1990, with the same 15-day comment period; and the Secretary issued the final rule on September 21, 1990.

Appellants Cal-Almond, Gourmet Packing, and Gold Hills filed administrative petitions, pursuant to 7 U.S.C. Sec. 608c(15)(A), challenging the lawfulness of the procedures used

by the Secretary to establish the 25 percent reserve requirement for the 1988-89 crop year; the validity of certain actions that the Board and Secretary require handlers to take to comply with the reserve requirement; and the validity of Secretary's imposing assessments on reserve almonds. After consolidation, the ALJ rejected most of the challenges, but held that the 1988-89 reserve and assessment rules were invalidly retroactive. On appeal, the JO upheld the Secretary's actions in all respects and the district court did the same.

Appellants Cal-Almond and Gold Hills had also filed an administrative petition challenging various USDA actions under the Order for the crop year 1990-91. The ALJ rejected their challenges and the JO affirmed. After appellants filed suit in district court, the parties stipulated that the district court should grant summary judgment for USDA without prejudice to appellants' right to appeal, which the district court did. Appellants appeal both judgments.

B. Discussion.

1. Lawfulness of 1989-90 and 1990-91 reserve obligation rules.

(a) Retroactivity.

Appellants claim that the 1988-89 and 1990-91 reserve obligation rules were unauthorized retroactive rules. We hold that even if the rules were retroactive, they were expressly authorized by Congress and were therefore valid. Georgetown Univ. Hosp., 488 U.S. at 208, 109 S.Ct. at 471-72. The Act provides that marketing orders may contain terms

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> [a]llotting, or providing methods for allotting, the amount of [a] commodity . . . which each handler may market . . . under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity . . . to be marketed . . . during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

7 U.S.C. Sec. 608c(6)(C) (1988). The focus of the statute is on the total quantity of almonds to be marketed during any period specified by the Secretary — in this case, the July 1-June 30 crop year. The statute requires the total quantity of almonds salable during this period to be allotted "equitably" among the handlers. To do so, the Secretary has to take into account almonds shipped between the beginning of the crop year and the issuance of the final reserve rule. Thus, the reserve obligation rules, even if retroactive, are authorized by the Act.

(b) Arbitrariness.

We may set aside an agency's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citizens for Clean Air v. E.P.A., 959 F.2d 839, 844 (9th Cir. 1992) (quotation omitted). Appellants contend that the final 1988-89 reserve obligation rule was arbitrary and capricious because it was issued after undue delay. The Board recommended the 25 percent reserve obligation on July 20,

1988. The Secretary issued a proposed rule on September 16, 1988, but did not issue a final rule until January 25, 1989, over four months later, and seven months into the crop year. According to appellants, the most active times for almond sales are in late summer and early fall; consequently, appellants argue, it was arbitrary and capricious for the Secretary to have waited until well after this time had passed to issue a final reserve obligation rule.

However, appellants have cited no cases, and we have found none, holding that an agency's delay in issuing a rule makes the rule itself arbitrary or capricious. Therefore, although the delay was certainly unfortunate and should be avoided in the future, it was not arbitrary or capricious.[14]

Appellants also contend that the 1988-89 and 1990-91 reserve obligation rules were arbitrary and capricious because they did not include a sufficient statement of basis and purpose as required by 5 U.S.C. Sec. 553(c). We disagree. In the 1988-89 rule, USDA set out its calculations of supply and demand for California almonds and explained why a 25 percent reserve obligation was necessary:

> While this rule may restrict the amount of almonds which handlers may sell in normal domestic and expert markets, the salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger

14. The cases cited by appellants address the adequacy of agency explanations of the contents of their rules, not the delays in promulgating them. See, e.g., North Germany Area Council v. Federal Labor Relations Auth., 805 F.2d 1044 (D.C.Cir.1986); Celcom Communications Corp. v. F.C.C., 789 F.2d 67 (D.C.Cir.1986).

> marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market. If the reserve were zero and all available California almonds were salable, almond prices, in a market which already has record supplies on hand, would be expected to drop in both domestic and foreign markets. Thus, the Board's recommendation for a 25 percent reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

54 Fed.Reg. 3584 (1989). A similar statement was included for the 1990-91 reserve obligation rules. See 55 Fed.Reg. 38,793, 38,794 (1990). Both statements explain the rules' basis (almond supply and demand estimates) and purpose (avoiding unreasonable fluctuations in supplies and prices).

Furthermore, USDA addressed the primary comments on the proposed reserve obligations that were made during the 15-day notice and comment period, such as objections to the crop size estimates, demand estimates, and reserve obligation size. See 54 Fed.Reg. 3584, 3585-87 (1989); 55 Fed.Reg. 38,793, 38,794-97 (1990).[15] The rules thus satisfied the requirement that

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15. The following example is illustrative:

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they "indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did." Independent United States Tanker Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C.Cir.), cert. denied, 484 U.S. 819, 108 S.Ct. 76, 98 L.Ed.2d 39 (1987).

Finally, appellants claim that the reserve obligation rules were arbitrary and capricious because USDA did not follow the dictates of Departmental Regulation (DR) 1512-1 in promulgating them. We have no authority to review appellants' challenge, because section 1 of DR 1512-1 states that "[t]his directive . . . is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person." See Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir.1986) (this language evinces "clear and unequivocal intent

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> Many commenters who opposed the 35 percent reserve indicated that there is an over production of California almonds and that holding almonds in reserve this year will add to the surplus in following years. Over the past decade, however, annual marketable production has failed to meet trade demand needs for the 1983-84, 1985-86, 1986-87, and 1989-90 crop years. Given the wide swings in production from year to year which characterize the almond industry, it is possible that the 1991 crop could fall short of 1991-92 trade demand needs. If early projections of the 1991 crop indicate that this would likely be the case, an appropriate quantity of 1990-91 crop year reserve almonds would be released to the salable category to augment 1991-92 crop year supplies.

55 Fed.Reg. 38,793, 38,794 (1990).

that agency compliance with Executive Order 12,291 not be subject to judicial review").

2. 1990-91 agency agreements for reserve almond disposition.

A handler has two alternatives for disposing of reserve almonds. First, the handler may turn them over to the Board, which has the "power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. Sec. 981.66(a) (1993). The Board then distributes the proceeds from such disposition to the handlers on a pro rata basis. 7 C.F.R. Sec. 981.66(g) (1993). Alternatively, the handler may obtain authorization from the Board to act as the Board's agent in disposing of the reserve; all agents so authorized must sign agency agreements with the Board which contain "such reasonable terms and conditions, including inspection and certification requirements, as the Board may specify". 7 C.F.R. Sec. 981.67 (1993).

The agency agreements for the crop year 1990-91 contained a provision stating: "If established by the Secretary, minimum prices will apply to reserve almonds diverted to eligible outlets . . . Agents will be notified of any such minimum price schedule established." Appellants contend that because the agency agreements include this provision, they violate both the Act and the APA.

(a) Agency agreements and the Act.

Appellants claim that the minimum price provision violates the Act because the Act forbids the fixing of prices with respect to almonds. This is incorrect; the Act is silent regarding whether agricultural marketing orders may set the prices that handlers

receive from their customers.[16] The Act does state that almond marketing orders may provide for the establishment of reserve pools of almonds and provide "for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein." 7 U.S.C. Sec. 608c(6)(E) (1988). The Almond Marketing Order further provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. 981.66(a) (1993) (emphasis added). Because including minimum price provisions in agency agreements is consistent with this mandate, we hold that the agreements do not violate the Act.

(b) Agency agreements and the APA.

Appellants contend that the minimum price provision was an "additional regulation" requiring the Secretary to follow the APA's notice-and-comment procedure before adopting the agency agreements.[17] Appellants cite American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C.Cir.1987), in support of their argument. In American Hosp. Ass'n, the D.C. Circuit addressed the issue of whether the Department of Health and Human

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16. Appellants quote our observation in Pescosolido v. Block, 765 F.2d 827 (9th Cir.1985), that "the Secretary is not empowered to fix prices for any [commodities other than milk] covered by the Act." Id. at 830. Pescosolido is inapplicable to the present case because it dealt with the prices that handlers pay to producers, not the prices that handlers receive from their customers.

17. Agency agreements are contracts, and the APA does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefit, or contracts." 5 U.S.C. Sec. 553(a)(2) (1988) (emphasis added). In 1971, however, USDA promulgated a regulation making the APA's procedural requirements applicable to all of its rule making relating to contracts. 36 Fed.Reg. 13,804 (1971).

Services (HHS) had to subject certain of its contracts to APA notice and comment. As part of the Medicare program, HHS was required to contract with "peer review organizations" (PROs), private organizations of doctors that would monitor the professional activities of Medicare service providers in their areas. Id. at 1041. Congress granted HHS great discretion to contract with each PRO as it saw fit, in order to tailor the service review process to local needs. Id. at 1053. The statute provided specifically that

> Contracting authority of the Secretary under this section may be carried out without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States as the Secretary may determine to be inconsist nt with the purposes of this part.

Id. (quoting 42 U.S.C. Sec. 1320c-2(e)). The D.C. Circuit held that this statutory language exempted HHS only from "the vast corpus of laws establishing rules regarding the procurement of contracts from the government," and did not exempt HHS from the "general restraints" of the APA. Id. at 1054. More specifically, the language did not "restor[e] a broad exemption from all APA requirements that would allow HHS on its own to modify vitally important provisions of peer review." Id. The court found that since Congress had granted HHS very broad discretion to implement the peer review program through individualized contracts with PROs, the danger of HHS' "legislating" the program through contractual terms was too high unless those terms were subject to APA notice and comment. Id. The court concluded that "any contract provisions that are legislative are subject to Sec. 553's notice and comment requirements." Id. (emphasis added).

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We find the agency agreements to be distinguishable from the PRO agreements at issue in American Hosp. Ass'n. There, the central mechanism for implementing the entire peer review program was the PRO contracts, because Congress had mandated that HHS enter into such a contract with a PRO in each area. Thus, there was a real danger that HHS would assume the role of unelected legislative body and promulgate statutory law under the guise of PRO contract terms. Here, by contrast, the agency agreements are incidental to the administration of the Order; they simply give handlers another, perhaps preferable, option for disposing of their reserve almonds. Unlike the program at issue in American Hosp. Ass'n, USDA is not required to enter into agreements with handlers, nor is any individual handler required to enter into an agreement with USDA. Because the agreements are incidental to the entire program, and because handlers have another option, there is little danger that USDA will legislate through agency agreements.

Furthermore, even if the agency agreements did raise the dangers identified in American Hosp. Ass'n, the only provision that appellants specifically object to — the minimum price provision — is not "legislative" and thus would not be subject to APA procedures. The Act grants the Secretary the power to "provid[e] for the equitable distribution of the net return derived from the sale [of the reserve pool] among the persons beneficially interested therein." 7 U.S.C. Sec. 608c(6)(E) (1988). We held above that a minimum price provision is a legitimate means of enforcing this requirement; the provision is thus a "procedural" rule exempt from the APA's requirements. See American Hosp. Ass'n, 834 F.2d at 1055 ("procedural" rules, those that are "legitimate means of structuring [the agency's] enforcement authority," are exempt from the APA notice and comment requirement).

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3. Restrictions on handlers' disposition of reserve almonds.

(a) Reserve almond storage requirements.

During the 1988-89 crop year, the Board informed handlers that their reserve almonds had to be stored in California. The Board instituted this requirement without following the procedural rule making requirements of the APA. Appellants argue that the California storage rule is a substantive rule that could have been promulgated only through compliance with the APA.

The Order grants the Board the power to "receive, investigate and report to the Secretary complaints of violations of [the Order]." 7 C.F.R. Sec. 981.38 (1993). To aid the Board in exercising this power, the Order also provides that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of [certain] records and for inspection and observation of almonds." 7 C.F.R. Sec. 981.70 (1993). The California storage rule helped ensure such accessibility and was thus a "legitimate means of structuring [the agency's] enforcement authority." American Hosp. Ass'n, 834 F.2d at 1055. We hold that the California storage requirement, like the minimum price provision, was a "procedural" rule exempt from the APA notice-and-comment requirement.[18]

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18. While storing almonds in California may have inconvenienced appellants, the mere fact that a rule may have a substantial impact "does not automatically transform it into a legislative rule." State ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm'n, 966 F.2d 1541, 1554 (9th Cir. 1992) (quotation omitted).

(b) Future sales contracts for reserve almonds.

The Order prohibits the "handling" of reserve almonds. 7 C.F.R. Sec. 981.50 (1993). The Order defines "to handle" as "to sell" or "to put into channels of trade." 7 C.F.R. Sec. 981.16 (1993). In December 1988 USDA sent out a letter stating that it considered a contract for the disposition of reserve almonds entered into before the release of the reserve to be a "sale" and thus a prohibited act of "handling." Effectively, then, USDA prohibited handlers from entering into contracts to sell reserve almonds.

Appellants contend that this letter was a rule that should have been promulgated pursuant to the notice and comment requirements of the APA. However, "interpretive" rules — "those which merely clarify or explain existing law or regulations" — are exempt from these requirements. Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986) (quotation omitted); 5 U.S.C. Sec. 553(b)(A) (1988). USDA's prohibition on the pre-release sale of reserve almonds is just such a rule, because it interprets the Order's prohibition on the handling of reserve almonds. The rule is therefore exempt from APA notice and comment.

4. Assessments on reserve almonds.

USDA currently imposes assessments on the total quantity of almonds received by handlers, including those in the reserve. Appellants contend that both the Act and the Order prohibit USDA from doing so.

We disagree. The Act states that each handler shall be assessed pro rata for reasonable Board expenses

> other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order.

7 U.S.C. Sec. 610(b)(2)(ii) (1988) (emphasis added). Appellants argue that the Board does not dispose of the reserve almonds "for the benefit of" the handlers and that therefore the Board cannot impose assessments on those almonds to cover the expenses of doing so. However, the proceeds from the Board's disposition of a handler's almonds are turned over to the handler. 7 U.S.C. Sec. 608c(6)(E) (1988); 7 C.F.R. Sec. 981.66(g) (1993). The reserve almonds are therefore disposed of "for the benefit" of the handlers, and the Board may consequently impose assessments on them.

We also reject appellants' contention that the Order prohibits the imposition of assessments on reserve almonds. The Order states that a handler shall only be assessed on almonds "received by him for his own account." 7 C.F.R. Sec. 981.81(a) (1993). All reserve almonds are originally "received" by handlers for their own account, and thus subject to assessment. Only after being received by handlers are a certain percentage of almonds then "held" for the account of the Board. Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds. This terminology and regulatory structure is admittedly somewhat ambiguous, but "where Congressional intent is ambiguous, courts should defer to a reasonable agency interpretation of a statutory scheme the agency is entrusted to administer." Railway

Labor Executives' Ass'n v. I.C.C., 958 F.2d 252, 256 (9th Cir.1991). We defer to USDA's reasonable interpretation of the Order.

IV. THE ADMINISTRATIVE REMEDY PROCEDURE

Appellants finally contend that the long and tortuous path they have had to follow to exhaust their claims violates their right to due process. While we understand appellants' frustration with the administrative remedy procedure, we must also reject their argument. Appellants claim that the procedure does not provide petitioners with a "clear and certain remedy;" however, we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due. Saulsbury Orchards, 917 F.2d at 1195 (quoting Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 452 (9th Cir.1983)).[19] As for the amount of time appellants have spent pressing their claims, we agree with the district court's reasoning that

> [w]hile there is no question that completion of the administrative process in connection with this Section 15(A) petition was very

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19. Contrary to appellants' contention, the Supreme Court's holding in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), does not require the remedy to consist of compensatory damages. The Court held only that an appropriate remedy for taxes unlawfully collected from plaintiff could either be a refund of taxes unlawfully collected or an assessment and collection of back taxes from the plaintiff's competitors. Id. at 40, 110 S.Ct. at 2252. McKesson never held that compensatory damages were required; it held only that a refund of unlawful taxes was one possible way for the State to satisfy the requirements of the Due Process Clause.

> lengthy, it is also apparent that some of the delay resulted from the sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs ... [T]he court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

The length of the proceedings, although certainly regrettable, was not a denial of due process.

V. CONCLUSION

We affirm the judgments for USDA on all issues except the almond marketing program, which we find to violate the First Amendment. We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. Sec. 2412. Because of the fact-intensive nature of the inquiry, we find that "[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court." Chicago Teachers Union v. Hudson, 475 U.S. 292, 310, 106 S.Ct. 1066, 1078, 89 L.Ed.2d 232 (1986). See also Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). The case is remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX D — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AT FRESNO DATED SEPTEMBER 20, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

D.C. DOCKET NO. CV-F-86-87-REC

UNITED STATES,

Plaintiff,

vs.

SAULSBURY ORCHARDS & ALMOND PROCESSING,

Defendant.

JUDGMENT AND ORDER THEREON

Based upon the Ninth Circuit Court of Appeals decision in *Cal-Almond, Inc. et al vs. United States Department of Agriculture* (and related cases), 14 F.3d 429 (9th Cir. 1993), the post-remand briefs filed by the parties, the hearing of July 18, 1994 on the post-remand relief, and this Court's order of September 6, 1994 IT IS HEREBY ORDERED AND ADJUDGED that the $529,406.25 deposited by Saulsbury Orchards & Almond Processing with the Clerk of the Court, *plus all accrued interest on that sum* is hereby ordered transferred to Saulsbury Orchards & Almond Processing, Inc's. Trustee in bankruptcy, case entitled In Re: Saulsbury Orchards & Processing, Inc., a California corporation, debtor, case number

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91-10898A-11F (Chapter 11 proceeding now converted to a Chapter 7 proceeding), Trustee Ellen Briones. The Clerk of this Court is hereby ordered to forthwith make said transfer of said sum, to Ellen Briones, Trustee, at her address P.O. Box 14173, Pinedale, California 93650, and to notify counsel for the parties when said transfer of sum takes place. Counsel for the parties are: for the Defendant, Saulsbury Orchards & Almond Process, Brian C. Leighton, 701 Pollasky, Clovis, California 93612; and for the Plaintiff, The United States Department of Justice Civil Division, Attn: Kevin Simpson, 901 E Street, N.W., Room 938, Washington, D.C. 20530, and to Daniel Bensing, United States Attorney's Office, 1130 "O" Street, Room 3654, Fresno, California 93721. September __, 1994

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ROBERT E. COYLE
United States District Judge

APPENDIX E — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AT FRESNO DATED SEPTEMBER 19, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

D.C. DOCKET NO. CV-F-91-064-REC

CAL-ALMOND, INC., SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC. and CARLSON FARMS,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

D.C. DOCKET NO. CV-F-91-122-REC

CAL-ALMOND, INC.,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

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D.C. DOCKET NO. CV-F-91-123-REC

CAL ALMOND, INC., a California corporation; GOURMET PACKING COMPANY, INC., a California corporation; and GOLD HILLS NUT COMPANY, INC., a California corporation,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE and THE UNITED STATES OF AMERICA,

Defendants.

D.C. DOCKET NO. CV-F-91-685-REC

CAL-ALMOND, INC. and GOLD HILLS NUT COMPANY, INC.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

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D.C. DOCKET NO. CV-F-92-5684-REC

CAL-ALMOND, INC.; GOLD HILLS NUT COMPANY, INC.; and FRAZIER NUT FARMS, INC.

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT AND ORDER THEREON

The above entitled cases came on for a hearing on July 18, 1994 as a result of the above entitled Plaintiffs' respective post-remand motions for refund of Almond Board assessments and the Defendants' respective motions on remand, following the Ninth Circuit Court of Appeals opinion in *Cal-Almond, Inc. et al vs. The United States Department of Agriculture* (and related cases), 14 F.3d 429 (9th Cir. 1993), which resulted in an order of this Court of September 6, 1994 in the above entitled cases. The issues to be resolved were the extent to which advertising assessments assessed against each of the Plaintiffs in the above entitled action should be refunded. Following this Court order of September 6, 1994 parties agreed that the following sums of money were at issue for the almond crop years of 1980-1981 through the 1991-1992 crop years;

CAL-ALMOND, INC.

A. Amounts spent on creditable advertising $1,433,619.96

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B. Creditable advertising assessments paid to the Almond Board $22,650.00

C. Amount of creditable advertising assessments placed in or credited to an attorney/client trust fund account $1,147,549.03

D. Portion of annual assessments applied towards the Almond Board's generic promotional activity $45,637.41

IT IS HEREBY ORDERED AND ADJUDGED THAT: The Defendants in the above entitled action are to forthwith pay to Cal-Almond, Inc. through its attorney, Brian C. Leighton at 701 Pollasky, Clovis, California 93612, the collective sums in paragraphs A, B and D above, the total amount of which is $1,501,907.37. IT IS FURTHER ORDERED the amounts in paragraph C above, the amounts credited to the attorney/client trust fund account, are hereby released to Cal-Almond, Inc.

SAULSBURY ORCHARDS

A. Amounts deposited with the Clerk of the Court in that certain case entitled United States of America vs. Saulsbury Orchards & Almond Processing, No. CV-F-86-87 (EDP) now REC $529, 406.25 plus all accrued interest.

B. Amounts spent on creditable advertising $807,327.53

C. Portion of annual assessments applied towards the Almond Board's generic promotional activities $23,984.40

IT IS HEREBY AND ORDERED AND ADJUDGED that the Defendants in the above entitled case forthwith pay to the

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Trustee, Ellen Briones at P.O. Box 14173, Pinedale, California 93650, Trustee of Saulsbury Orchards & Almond Processing in that certain bankruptcy action entitled In Re: Saulsbury Orchards & Almond Processing, Inc., a California corporation, Debtor, Case No. 91-10898A-11F (Chapter 11 proceeding now converted to a Chapter 7 proceeding) the sums listed in paragraph B above, the total of which is $831,311.93. A separate court order and judgment thereon is being issued in Case No. 86-87, described above, with respect to paragraph A above and directed to the Clerk of the Court.

CARLSON FARMS

A. Amount of creditable advertising assessments paid to the Almond Board $38,128.19

B. Portion of annual assessments applied towards the Almond Board's generic promotional activities $00.00

IT IS HEREBY ORDERED AND ADJUDGED that the sum of $38,128.19 be forthwith paid by the Defendant in the above entitled action to Carlson Farms, through its attorney, Brian C. Leighton, 701 Pollasky Avenue, Clovis, California 93612.

GOLD HILLS NUT COMPANY, INC.

A. Amount spent on creditable advertising $180,438.50

B. Portion of annual assessments applied towards the Almond Board's generic promotional activities $3,399.42

IT IS HEREBY ORDERED AND ADJUDGED the total sums above, $183,837.92 be paid by the Defendant in the above

entitled actions to Gold Hills Nut Company, Inc. through its attorney, Brian C. Leighton, 701 Pollasky, Clovis, California 93612.

FRAZIER NUT FARMS, INC.

A. Amount spent on creditable advertising $64,468.67

B. Creditable advertising assessments paid to the Board $00.00

C. Amount of creditable advertising assessments placed in escrow (attorney/client trust fund account) $32,024.90

D. Portion of annual assessments applied towards the Almond Board's generic promotional activities $1,627.79.

IT IS HEREBY ORDERED AND ADJUDGED that the total sums of money stated in paragraphs A and D, the total of which is $66,096.46 be forthwith paid by the Defendant in the above entitled actions to Frazier Nut Farms, Inc. through its attorney, Brian C. Leighton, 701 Pollasky, Clovis, California 93612. It is further ordered that the amounts of creditable advertising assessments placed in the attorney/client trust fund account be released to Frazier Nut Farms, Inc.

The Clerk of the Court is hereby directed to place a conformed copy of this order in the files of each of the above entitled cases.

September __, 1994

ROBERT E. COYLE
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 6, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-91-122 REC

CAL-ALMOND, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER RE PLAINTIFF'S POST-REMAND MOTION FOR REFUND AND DEFENDANT'S MOTION FOR REMAND

On July 18, 1994 the court heard plaintiffs' respective Post-Remand Motions for Refund of Almond Board Assessments and defendant's respective Motions to Remand.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its orders with respect to these motions as and for the reasons set forth herein.

A. *Background*

The Ninth Circuit, in *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429, 433-440 (9th Cir. 1993), held that the

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Almond Marketing Program described in the pertinent provisions of the Almond Marketing Order violated the First Amendment, thereby reversing this court's decision in favor of the U.S.D.A. on this issue. However, the Ninth Circuit affirmed this court's rulings rejecting other challenges made by plaintiffs to the Almond Marketing Order and its implementation. *Id.* at 440-449. The Ninth Circuit then concluded:

> We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ('EAJA'), 28 U.S.C. § 2412. Because of the fact-intensive nature of the inquiry, we find that '[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court.' *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 . . . (1986). *See also Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 . . . (1984). The case is remanded for further proceedings consistent with this opinion.

Id. at 449.

B. *Refund of Assessments*

Plaintiffs now move the court to refund to plaintiffs the creditable advertising assessment imposed on each of the respective plaintiffs for the years at issue with respect to each plaintiff and to refund to plaintiffs that percentage of the annual

assessment for the years at issue attributable to the advertising and promotion budget for that year. In addition, plaintiffs seek interest on the refunded amounts at the rate of 5% per annum. Plaintiffs essentially take the position that resolution of the remand is a simple matter of accounting. The 5% per annum. Plaintiffs essentially take the position that resolution of the remand is a simple matter of accounting. The Department argues that certain components of the recovery sought by plaintiffs are barred by the doctrine of sovereign immunity, that others should be determined in the first instance by administrative proceedings, and/or that the court must conduct an evidentiary hearing to determine the total amount of any refund to be paid to plaintiffs.

A. *Sovereign Immunity.*

1. *Creditable Advertising Amounts.*

A portion of the monies that plaintiffs now seek to have refunded to them by the Department are amounts that plaintiffs spent on advertising through the creditable advertising provisions (as opposed to amounts turned over to the Almond Marketing Board as assessments a portion of which was spend by the Almond Marketing Board on advertising).[1]

Although recognizing that a return of assessments does not

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1. The Almond Marketing Order provided that handlers' assessments collected from handlers based on the volume of almonds they handle could be reduced by the amount that a handler spends on authorized advertising. Before a handler could receive credit for his marketing promotion expenditures, the California Almond Board must have determined that such expenditures meet the requirements of the creditable advertising regulations.

necessarily implicate sovereign immunity, the Department argues that a request to be compensated for sums previously spent but not remitted to the government constitutes a request for money damages which is barred by sovereign immunity. In so

In *Bowen*, the United States Supreme Court construed Section 702 of the Administrative Procedure Act as not foreclosing judicial review of an action brought by a state challenging a disallowance order under the Medicaid provisions. In so ruling, the Supreme Court stated in pertinent part as follows:

> Our cases have long recognized the distinction between an action at law for damages — which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation — and an equitable action for specific relief — which may include an order providing for the reinstatement of an employee with back pay, or for 'the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions.' ... 1The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'

487 U.S. at 893.

Bowen cited with approval its decision in *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985). In *Burlington*, the Supreme Court held that

relief that ordered a town to reimburse parents for educational costs that Congress intended the town to pay is not "damages", stating in pertinent part as follows:

> In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.

Burlington, 471 U.S. at 370-371.

In addition, *Bowen* cited *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.D.C. 1985), wherein it was stated in pertinent part as follows:

> We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' . . . Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' . . .

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The Ninth Circuit has suggested that the remedy to a handler who successfully challenges a marketing order or its implementation is the "refund of any paid assessments found not to have been due . . . ." *See Saulsbury Orchards & Almond Processing v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 559 (9th Cir. 1988); *Naval Orange Admin. Committee v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983).[2]

The Department argues, however, that this suggestion cannot be applied here because, for those years in which the plaintiffs spent amounts equivalent to what their creditable advertising assessments would have been, those portions of the assessments never in fact became due and were never actually tendered to the Board.

Plaintiffs argue that the Department's position ignores the conclusion by the Ninth Circuit that the creditable advertising regulations violated the First Amendment because, among other things, "if handlers do not advertise according to the regulations, they must contribute their assessment to the Board, which is itself a type of compulsion implicating Appellants' First Amendment rights." 14 F.3d at 435-436. Plaintiffs further assert that the Department's argument that amounts spent pursuant to the creditable advertising regulations never became due begs the question. Because the assessments became obligations of the handlers when announced by the Secretary each crop year, the Almond Marketing Order and its regulations forced the plaintiffs into a choice of either paying that portion of the assessment

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2. These cases do not hold that this is the exclusive remedy. The cases were rejecting various arguments attempting to get around the application of *United States v. Ruzicka*, 329 U.S. 287 (1946).

attributable to advertising to the Board or to spend some portion of assessment on advertising which had to be approved by the Board in order to obtain a credit toward the annual assessment.

In this regard, plaintiffs refer the court to *Zellous v. Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990). In *Zellous*, the plaintiffs were former, present and prospective tenants of a housing project whose rent was subsidized under federal law. The *Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990). In *Zellous*, the plaintiffs were former, present and prospective tenants of a housing project whose rent was subsidized under federal law. The tenants contended that HUD, together with the housing project's owners and managers, violated the Housing Act and associate federal regulations as well as the APA by failing to make timely adjustments in their utilities allowance. This caused the tenants to pay a higher share of their income as rent than was permitted under the Brooke Amendment, which places a cap on the total of rent plus utilities for which tenants are responsible. In their complaint, the tenants requested "declaratory, injunctive and monetary relief or in the alternative restitution." The tenants contended that the retrospective aspect of this relief should require HUD reimbursement for the rent they paid beyond that which would have been due if the utilities allowance had been set higher. The Third Circuit rejected the claim that this requested relief constituted a request for money damages. In so doing, the Third Circuit stated in pertinent part as follows:

> We recognize that in *Bowen*, the plaintiff state sought specific relief under a statute that maintains direct payment to the state of a percentage of its Medicaid expenses . . . Here, neither section 8 nor the Brooke

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> Amendment mandates direct payments to the plaintiff tenants. Instead, the tenants rental obligations is reduced through a system of government subsidies to property owners. We do not believe that this scheme of indirect support for tenants transforms the character of the requested reimbursement as damages.

It appears that *Zellous*, although not exactly on point, does support the plaintiffs' position that what they seek are not money damages, but reimbursement for monies wrongfully expended pursuant to a government program. However, although it may be semantics, there may be a difference between the term refund and the term reimbursement. The fact that the monies at issue were not actually paid to the Board but were actually spent by plaintiffs implies that the concept at issue is one of reimbursement. In this regard, although plaintiffs focus on the term "due" when speaking of refunded assessments, it must be noted that the Ninth Circuit cases upon which plaintiffs rely actually use the phrase "refund of any *paid* assessments found not to have been due . . . ."

The court finds this to be a difficult question to resolve. Upon reflection, however, the court concludes that the refund or reimbursement of the creditable advertising amounts is not barred by sovereign immunity on the ground that the amounts represent money damages. The court is persuaded that the refund or reimbursement of these amounts is part of an equitable remedy designed to give to these plaintiffs what the Ninth Circuit has held they were entitled to because of the violation of the First Amendment. As noted by plaintiffs, they would not have spent this money were it not for the fact that both aspects of the advertising provisions of the Almond Marketing Order were unconstitutional.

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2. *Prejudgment Interest.*

Plaintiffs assert that the court should award them prejudgment interest at the rate of 5% on those assessments to be refunded to plaintiffs which have not already been placed by plaintiffs in escrow accounts.

However, an award of interest against the United States is barred by the doctrine of sovereign immunity. As reiterated in *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986):

> In cases not in the Court of Claims, this Court has reaffirmed the notion: 'Apart from constitutional requirements, in the absence of specific provision by statute, or "express consent . . . by Congress," interest does not run on a claim against the United States.'

The Supreme Court further explains the qualification of "constitutional requirements":

> The 'constitutional requirement' arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, 'just compensation' includes a payment for interest . . . The no-interest rule is similarly inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise . . . .

Id. at 317 n.5.

Plaintiffs argue that this doctrine does not apply in cases involving First Amendment violations. However, plaintiffs cite no cases in support of this contention and the court could locate any in its research. The cases upon which plaintiffs rely in asserting that they are entitled to prejudgment interest in cases involving deductions from dues in violation of the First Amendment are cases involving non-governmental defendants. *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993).[3] Although in remanding this action to this court for further proceedings, the Ninth Circuit cited *Ellis*, it did so by a "*see also*" citation with no particular page reference. The Ninth Circuit also cited *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986). However, there is no suggestion in this citation that the court was to award prejudgment interest. Rather, the citation was to clarify that the determination of the appropriate remedy should be made in this court first because of the factual nature of the relevant inquiries.

Therefore, the court rules that plaintiffs are not entitled to prejudgment interest because of the doctrine of sovereign immunity.

B. *Supplemental Fact Finding.*[4]

The Department takes issue with plaintiffs' contentions that

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3. In *Ellis*, the Supreme Court held that, to avoid forced subsidies forbidden by the First Amendment, unions must adopt procedures 'such as advance reduction of dues and/or interest-bearing escrow accounts.' 466 U.S. at 448.

4. Plaintiffs repeatedly argue that the Department conceded in pleadings (Cont'd)

no further fact finding is permitted by the Ninth Circuit's opinion and the remand order. The Department argues that the determination of the appropriate remedy in this case will require an examination of several equitable considerations and important issues concerning the operation of the Order under the AMAA, many of which cannot be evaluated based on the present administrative record.

1. *Motion to Remand.*

If it is concluded that supplemental fact finding is required in order to determine the appropriate remedy, the Department argues that the court should remand this matter to the Department "to craft such a remedy consistent with the future operation of the Order under the AMAA, based on a supplemental factual record created in an administrative proceeding and subject to judicial review of the award-determination by the Secretary."

(Cont'd)

filed in the Ninth Circuit that plaintiffs would be entitled to a full refund of the advertising assessments should plaintiffs prevail on the First Amendment issue. The court concludes that plaintiffs are reading more into these briefs than was intended by the Department. Moreover, the court questions that a statement made in the course of briefing an issue which did not address the specifics of fashioning a remedy can be deemed to be a concession. Finally, the portion of the Department's brief set forth as Exhibit K to plaintiffs, reply brief merely quotes the Department's response to plaintiffs' appeal of this court's ruling that plaintiffs' due process rights were not violated by the length of the administrative and review proceedings. The Department merely was referring to the Ninth Circuit law rejected such challenges because of the provisions of the AMAA providing handlers with an opportunity to recoup assessments found to have been wrongfully imposed.

Appendix F

a. *AMAA*.

The Department argues that such a remand is required by the statutory scheme of the AMAA and *United States v. Ruzicka*, 329 U.S. 287 (1946). Any challenge to the applicability of a marketing order must be made in the first instance administratively pursuant to section 8(c)(15) of the AMAA, 7 U.S.C. § 608 (c)(15). *Ruzicka, id.* at 294; *Pescosolido v. Block*, 765 F.2d 827, 831 (9th Cir. 1985). The Department argues:

> Here, any determination of the amount of any award requires specialized knowledge of the industry and the effect of various types of advertising. Perhaps even more importantly, any decision as to how to fashion a remedy, given the bar of sovereign immunity for damages, will entail an assessment of how best to effectuate the purposes of the AMAA while complying with the Ninth Circuit's mandate. The requirement that judicial review of legal issues pertaining to the marketing order be limited to an administrative record should apply to situations such as this one where a new set of facts must be established and reviewed in order to determine the appropriate remedy for a successful legal challenge to a marketing order.

Section 608c(15)(B) does provide in pertinent part that "[i]f the court determines that such a ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the

court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." However, the court does not read this provision to *require* that this court remand this matter to the Department for further administrative proceedings. Plaintiffs have already complied with the AMAA in bringing their challenges to the Almond Marketing Order. Plaintiffs have prevailed on the merits of two of their challenges. The Department cites no cases even suggesting that the AMAA requires that the remedy for a determined violation of law with respect to a marketing order must also be determined in the first instance by the Department. Absent specific case authority, this portion of the Department's motion to remand should be denied.

b. *Primary Jurisdiction.*

As an alternate basis for remanding this action to the Department to determine an appropriate remedy, the Department invokes the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction is explained in *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987):

> The doctrine of primary jurisdiction operates as follows: 'When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved.' . . . The doctrine applies when 'protection of the

> integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.' . . . Thus, it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine . . . .
>
> There are four factors uniformly present in cases where the doctrine properly is invoked: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.

The Department asserts that each of these factors is satisfied here and that the court should remand.

Plaintiffs respond that the invocation of the primary jurisdiction doctrine is not appropriate or necessary to the resolution of the issues presently before this court.

The court is not persuaded that remand to the Department as an exercise of primary jurisdiction is necessary. It seems to the court that, assuming the amounts to be refunded or reimbursed to plaintiffs can be determined from the record already before the court, *see* discussion *infra*, the mechanics of making payment(s),

although perhaps requiring some evidence from the Board, do not require any particular expertise of the Department.

2. *Ability to Conduct Supplemental Fact Finding.*

The parties dispute whether this court is permitted to conduct any supplemental fact finding by the terms of the Ninth Circuit's remand. Plaintiffs take the position that the Ninth Circuit has already held that plaintiffs did not receive any benefit from the creditable advertising and the generic promotion programs.

The Department argues that not only did the Ninth Circuit's decision not preclude supplemental factual findings about the extent of the benefits enjoyed by the plaintiffs, but it expressly contemplated further factual findings. The Department takes the position that supplemental fact finding is required to determine the following issues:

(1) the extent to which plaintiffs benefitted from the creditable advertising program;

(2) the extent to which plaintiffs benefitted from the generic promotion program;

(3) the extent to which plaintiffs' administrative assessments were applied to the Almond Board's generic promotion efforts; and

(4) the extent to which plaintiffs have already "passed through" the costs imposed on them by the advertising assessments.

Appendix F

Plaintiffs take the position that the Ninth Circuit did fashion a remedy and left the mechanical mathematical calculation to the District Court, i.e., all advertising assessments, whether creditable or the administrative portion that the Board assessed for its generic program must be refunded because the Plaintiffs' remedy is a refund of all assessments 'found not to have been due'.

Although the court believes that plaintiffs are quoting the Ninth Circuit's opinion out of context in an effort to imply that the Circuit actually held as argued by plaintiffs, *see Cal-Almond, Inc., supra*, 14 F.3d at 448-449, plaintiffs' assertion that the only reason that the Ninth Circuit's remand order referred to "fact-intensive nature of the inquiry" is because plaintiffs had requested a refund of the entire amount of the assessments at issue is a valid comment. Plaintiffs contend that the Ninth Circuit's citations to *Chicago Teachers Union v. Hudson* and *Ellis v. Ry. Clerks* establishes that the Ninth Circuit rejected that assertion and concluded that plaintiffs were entitled only to a refund of that portion of the assessments at issue attributable to the unconstitutional advertising programs, a fact-intensive inquiry.

The court is persuaded that plaintiffs' interpretation of the reason that the Ninth Circuit referred to the two Supreme Court cases is a fair one. In both of these cases, but in particular *Ellis*, there was a combination of union dues imposed for legal and illegal reasons. In *Ellis*, the Supreme Court remanded for a recalculation of damages. In holding that the union would bear the burden of proving by a preponderance of the evidence what proportion of union expenditures went to activities that could be charged to dissenters, the Supreme Court noted that absolute precision in the calculation of such proportion is not expected or

required because of the difficult accounting problems that may arise. *Ellis*, 466 U.S. at 457 n.15.

In disputing whether the Ninth Circuit's opinion forecloses or allows supplemental fact finding as argued by the Department, both parties refer the court to the concept of the "law of the case". The law of the case is explained in *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985):

> The law of the case doctrine states that the decision of an appellate court on a legal issue 'must be followed in all subsequent proceedings in the same case ' ... The law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, or the evidence on remand is substantially different . . . .
>
> . . .
>
> On remand, the trial court should only . . . consider ' "matters left open by the mandate of [the appellate] court." ' . . . .

The court concludes that its ability to conduct further supplemental fact-finding pursuant to the Ninth Circuit's remand is extremely limited. In the context of this action, the court ' concludes that the court may conduct supplemental fact-finding only with respect to the application of the assessments to the generic program. *See* discussion *infra*.

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3. *Benefit from Creditable Advertising Program.*

The Department argues that the only issue foreclosed by the Ninth Circuit's decision is whether the benefit derived by plaintiffs from the two advertising programs was greater than the benefit plaintiffs could have secured if they had been free to spend that same money in any manner they chose. However, the Department contends, the Ninth Circuit's opinion does not address whether there was some benefit realized by the plaintiffs that should properly be considered in making an equitable award determination.

However, the court agrees with plaintiffs that the supplemental fact finding sought to conducted here is foreclosed by the Ninth Circuit's opinion. The court does not read the opinion as allowing the Department to re-visit an issue determined against it.

4. *Application of Assessments to Generic Program.*

In their opening briefs, plaintiffs contended that the amount of the refund should be determined by the percentage of the Board's projected budget for a relevant crop year that was allocated for generic advertising purposes. Plaintiffs argued that if, for example, 25% of an projected budget was allocated to the generic advertising program, then 25% of plaintiffs' assessments for that year should be refunded.

However, the Department has presented evidence by way of a declaration of Michael L.H. Marsh, C.P.A., asserting that each year's generic promotion activities were largely funded not from administrative assessments, but from monies received during the previous crop years from handlers who did not fully utilize

their advertising credit and instead remitted an amount equivalent to their unused credit to the Board. Since neither Cal-Almond nor Saulsbury Orchard and Almond Processing (SOAP) ever remitted such funds to the Board during the period in question, they can have no claim to that portion of the generic promotion budget paid from those carry-over funds. Although asserting that a final accounting has not yet been conducted, the Department asserts that a preliminary examination of the Board's financial records suggest that approximately 81% of the generic promotion program was funded by these carry-over funds. The Department argues that a supplemental factual inquiry is necessary in order to fully resolve these accounting issues.

In their reply briefs, plaintiffs concede that a supplemental factual inquiry will be necessary to resolve this issue.

5. *"Passed Through" Costs.*

The Department argues that the court must conduct a supplementary factual hearing to determine the extent to which the plaintiffs have "passed through" the costs of the advertising assessments to the growers for whom they handle almonds. The Department contends that if plaintiffs have passed through any of these costs, then a complete refund of advertising assessments to the handlers would unjustly enrich the plaintiffs.

In making this argument, the Department refers the court to cases involving refunds of excises taxes. *See Rothman v. District Director of Internal Revenue*, 483 F.2d 1079, 1080-1081 (9th Cir. 1973); *Travel Industries of Kansas, Inc. v. United States*, 425 F.2d 1297, 1298 (10th Cir. 1970).

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However, plaintiffs refer the court to *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). In *McKesson*, wholesale liquor distributors filed suit challenging the Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida agricultural crops and then bottled in Florida. The Florida Supreme Court invalidated the excise tax as violating the Commerce Clause but refused to provide a refund or any other form of postpayment relief. In pertinent part, the United States Supreme Court rejected the Florida Supreme Court's reliance on two equitable considerations as grounds for denying retroactive relief:

> The Florida Supreme Court also speculated that 'if given a refund [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to [its] customers.' . . . The court's premise seems to be that the State, faced with an obligation to cure its discrimination during the contested tax period and choosing to meet that obligation through a refund, could legitimately choose to avoid generating a 'windfall' for petitioner by refunding only that portion of the tax payment not 'passed on' to customers (or even suppliers). Even were we to accept this premise, the State could not refuse to provide a refund based on sheer speculation that a 'pass-on' occurred. We repeatedly have recognized that determining whether a particular business cost has in fact been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry; a court

certainly cannot withhold part of a refund otherwise required to rectify an unconstitutional deprivation without first satisfactorily engaging in this inquiry.

In any event, however, we reject respondents' premise that 'equitable considerations' justify a State's attempt to avoid bestowing a so-called 'windfall' when redressing a tax that is unconstitutional because discriminatory. In *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386 . . . (1934), we enforced a statutorily created pass-on defense in a refund action designed to redress a tax overassessment. Comparing such an action to one in assumpsit for 'money had and received,' we affirmed the Federal Government's power in this equitable action to withhold the amount that the taxpayer had already passed on to others, on the theory that the taxpayer ought not to be 'unjustly enriched' by his recovery from the Government after he has already 'recovered' his losses through the pass-on. We observed that if the taxpayer 'has shifted the [economic] burden [of the tax] to the purchasers, they and not he have been the actual sufferers and are the real parties in interest,' . . . and he ought not receive a windfall for their injury.

But petitioner does not challenge here a tax assessment that merely exceeded the amount

> authorized by statute; petitioner's complaint was that the Florida tax scheme unconstitutionally discriminated against interstate commerce. The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent that petitioner passed on the economic incidence of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products . . . To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share. The State cannot persuasively claim that 'equity' entitles it to retain tax moneys taken unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place. We thus reject respondents' reliance on a pass-on defense in this context.

496 U.S. at 46-49.

Plaintiffs argue that *McKesson* applies to preclude a pass through inquiry any time an assessment is found to be

unconstitutional. Plaintiffs further argue that, because the Ninth Circuit has found that the regulations were designed to benefit Blue Diamond and since Blue Diamond benefitted from the regulations, Blue Diamond was able to out-compete plaintiffs for growers, offer the growers a better return, and cause economic injury to the plaintiffs.

At oral argument, defendant argues that plaintiffs' reliance upon *McKesson* is misplaced. Defendant contended that the nature of the constitutional violation must be examined in determining whether *McKesson* is applicable. In the case before the court, the First Amendment violations found to exist by the Ninth Circuit imposes the same burden on all handlers. In *McKesson*, however, the constitutional violation at issue was a discrimination in violation of the Commerce Clause.

The court concludes that *McKesson* is controlling. Although the constitutional violations are different and the First Amendment does not normally involve discrimination, it cannot be gainsaid that the Ninth Circuit was of the opinion that the advertising program benefitted Blue Diamond to the detriment of other handlers, thereby placing those other handlers in a competitive disadvantage.

6. *Profit.*

The Department further argues that the court should conduct a supplementary fact finding hearing to determine the extent to which plaintiffs profited from their own advertising expenditures incurred in order to receive credit against their annual assessments. In making this argument, the Department refers the court to the statement in the Ninth Circuit's opinion that "Saulsbury estimated that every dollar spent on creditable

advertising returned less than fifty cents in sales." 14 F.3d at 438. In addition, the Department refers to the statement that "in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000." *Id.* at 438 n.8. The Department implies from these two statements that the Ninth Circuit explicitly conceded that the creditable advertising engaged in by the plaintiffs was not wholly ineffective. The Department asserts that the record establishes that plaintiffs made some sales as a result of their advertising expenditures that they would not have realized without those expenditures and that plaintiffs should subtract the sales actually resulting from creditable advertising from any request for a refund of monies spent on creditable advertising.

Plaintiffs oppose this request, calling it "just another distorted and depraved effort by the Government to delay and deprive Plaintiffs of their victory in the landmark Ninth Circuit decision."[5] Plaintiffs further assert that the reference to Saulsbury's evidence was to gross sales and not to net sales. Plaintiffs also argue that "if Saulsbury and Cal-Almond were not required to wastefully spend hundreds of thousands of dollars per year on Government ordered advertising, there can be no facts, other than utterly speculative facts, as to how much money the Plaintiffs would have made without said unconstitutional assessments, and if left with their money and with their own devices to promote their product in their own targeted markets."

Although the court can understand the logic of the Department's position, it is foreclosed by the Ninth Circuit's opinion just as the determination of the extent to the benefit to

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5. Depraved, by the way, means marked by corruption, perversion or deterioration. I think that Brian is pitching it pretty strong.

plaintiffs from the invalidated programs should be foreclosed. As discussed by the Ninth Circuit, the programs did not benefit the participants sufficiently to overcome the constitutional infirmities. That being the case, the court agrees with plaintiffs that any further inquiry into profit moves into the realm of speculation.

ACCORDINGLY, IT IS ORDERED that the respective plaintiffs' Post-Remand Motions for Refund of Almond Board Assessments are granted.

IT IS FURTHER ORDERED that defendant's respective Motions for Remand are denied.

IT IS FURTHER ORDERED that the parties appear on Monday, September 26, 1994 at 1:30 p.m. for further proceedings in connection with the application of assessments to the generic program. The parties are ordered to be prepared to present their respective factual positions to the court with respect to this issue at this hearing.[6]

Dated: September 6, 1994

s/ Robert E. Coyle
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

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6. The court advises the parties that it will not issue any final orders with respect to refunds until this factual issue is resolved.

Appendix F

United States District Court
for the
Eastern District of California
September 6, 1994

* * CERTIFICATE OF SERVICE * *

1:91-cv-00122
and related cases.

Cal-Almond Inc

v.

AGRI

I, the undersigned, hereby certify that I am an employee in the Office of :he Clerk, U.S. District Court, Eastern District of California.

That on September 6, 1994, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Appendix F

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APPENDIX G — STIPULATION REGARDING AMOUNT OF AWARD FILED SEPTEMBER 19, 1994

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ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

CASE NO. CV-F-91-064 REC
CV-F-91-122 REC
CV-F-91-123 REC

Appendix G

CAL-ALMOND, INC., et al,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

STIPULATION REGARDING AMOUNT OF AWARD

It is hereby stipulated and agreed, by and between plaintiffs and defendant, by and through their respective counsel, that the amounts listed below are accurate calculations of the monies claimed by the plaintiffs in this proceeding:

Cal-Almond, Inc.

Credible Advertising Assessments Paid to Board	$ 22,650.00
Credible Advertising Assessments Placed in Escrow	$ 1,147,549.03
Portion of Annual Assessments Applied Towards Board's Generic Promotional Activities	$ 45,637.41
Amount Spent on Creditable Advertising	$ 1,433,619.96
Total:	$ 2,649,456.40

Appendix G

Saulsbury Orchards

Creditable Advertising Assessments Paid to Board	$	00.00
Creditable Advertising Assessments Escrowed with the Clerk of Court (BCL; KMS)	$	529,406.25
Portion of Annual Assessments Applied Toward Board's Generic Promotional Activities	$	23,984.40
Amount Spent on Credible Advertising	$	807,327.53
Total:	$	1,360,718.18

Carlson Farms

Creditable Advertising Assessments Paid to Board	$	38,128.19
Creditable Advertising Assessments Placed In Escrow	$	00.00
Portion of Annual Assessments Applied Toward Board's Generic Promotional Activities	$	00.00
Amount Spent on Creditable Advertising	$	00.00
Total:	$	38,128.19

Appendix G

Gold Hills

Creditable Adverting Assessments Paid to Board	$	00.00
Creditable Advertising Assessments Placed in Escrow	$	00.00
Portion of Annual Assessments Applied Toward Board's Generic Promotional Activities	$	3,399.42
Amount Spent on Creditable Advertising	$	180,438.50
Total:	$	183,837.92

Frazier

Creditable Advertising Assessments Paid to Board	$	00.00
Creditable Advertising Assessments Placed In Escrow	$	32,024.90
Portion of Annual Assessments Applied Toward Board's Generic Promotional Activities	$	1,627.79
Amount Spent on Creditable Advertising	$	64,468.67
Total:	$	98,121.36

Aggregate totals

Appendix G

Subtotal (assessments paid to Board)	$	60,778.19
Subtotal (escrow amounts)	$	1,708,980.18
Subtotal (portions of annual assessments applied toward's Board's generic promotional activities)	$	74,649.02
Subtotal (amounts spent on advertising)	$	2,485,854.66
Combined Total:	$	4,330,262.05
Combined Total (minus escrowed amounts)	$	2,621,281.87
Combined Total (minus escrowed amounts and amounts spent by plaintiffs on advertising)	$	135,427.21

Dated: September 19, 1994

s/ Brian C. Leighton
Brian C. Leighton
Attorney for the Plaintiffs

RICHARD JENKINS
United States Attorney

DANIEL BENSING
Assistant United States Attorney

FRANK W. HUNGER
Assistant Attorney General

Appendix G

Dated: September 19, 1994

s/ Thomas Millet
THOMAS MILLET

s/ Brian C. Leighton for
Kevin M. Simpson

s/ Kevin M. Simpson
KEVIN M. SIMPSON
(*I have authorized Brian Leighton to sign another copy of this stipulation for me*) K.S.
Trial Attorneys
U.S. Department of Justice
Civil Division – Room 938
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Washington, D.C. 20530

Attorneys for Defendant

IT IS SO ORDERED

Dated: SEP 19 1994

s/ ROBERT E. COYLE
U.S. District Court Judge

APPENDIX H — RELEVANT STATUTES AND REGULATIONS

5 U.S.C.A. § 702

United States Code Annotated
Title 5. Government Organization and Employees
Part I — The Agencies Generally
Chapter 7 — Judicial Review

Current through P.L. 104-28, approved 9-6-95

Sec. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Appendix H

5 U.S.C.A. § 704

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C.A. § 706

5 USCA Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix H

7 U.S.C.A. § 608c

United States Code Annotated
Title 7. Agriculture
Chapter 26 — Agricultural Adjustment
Subchapter III — Commodity Benefits

Current through P.L. 104-28, approved 9-6-95

Sec. 608c. Orders regulating handling of commodity

(1) Issuance by Secretary; rulemaking in response to recommendations of administrative committees

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

Appendix H

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples . . .* * *.

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order. Provided, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida grown strawberries, such projects may provide for any form of marketing promotion including paid

advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . * * *.

(7) Terms common to all orders

In the case of the agricultural commodities and the products therof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless

such person receives compensation for his personal services from funds of the United States. . . . * * *.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title.

Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C.A. § 610

Sec. 610. Administration

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2) (ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata

share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

Appendix H

7 C.F.R. § 981.13

Code of Federal Regulations
Title 7 — Agriculture
Subtitle B — Regulations of the Department of Agriculture
Chapter IX — Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts)
Part 981 — Almonds Grown in California
Subpart — Order Regulating Handling
Definitions

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 981.13 Handler.

'Handler' means any person handling almonds during any crop year, except that such term shall not include either a grower who sells only almonds of his own production at retail at a roadside stand operated by him, or a person receiving almonds from growers and other persons and delivering these almonds to a handler.

Appendix H

7 C.F.R. § 981.41

Code of Federal Regulations
Title 7 — Agriculture
Subtitle B — Regulations of the Department of Agriculture
Chapter IX — Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts)
Part 981 — Almonds Grown in California
Subpart — Order Regulating Handling
Research

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 981.41 Research and development.

(a) General. The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to Sec. 981.81(a) or credited pursuant to paragraph (c) of this section.

(b) Authorization. If, on the basis of a Control Board recommendation pursuant to Sec. 981.40(e) with respect to projects pursuant to this section, and appertaining rules and

regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) Creditable expenditures. The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: Provided, That, with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pretesting of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade promotion allowances shall not be eligible for credit against a handler's assessment obligation.

(d) Promotion guidelines. All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) Rules and regulations. Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

7 C.F.R. § 981.81

Sec. 981.81 Assessment.

(a) Requirement for payment. Each handler shall pay to the Board on demand by the Board, from time to time, such sum less any amounts credited pursuant to Sec. 981.41, based on such rate per pound of almonds, kernel weight basis, received by him for his own account (except as to receipts from other handlers on which assessments have been paid) as the Secretary finds is necessary to provide funds to meet the authorized board expenses and the operating reserve requirements, and

establishes for the crop year. Upon redetermination of the kernel weight of almonds received by handlers for their own account as provided in Sec. 981.61, such redetermined kernel weight for each handler, adjusted for receipts on which assessments have been paid, shall be the basis upon which he shall pay assessments. At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds during such crop year to secure sufficient funds to cover the expenses authorized by Sec. 981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand. The payment of assessments for the maintenance and functioning of the Board may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) Refunds. Any money collected as assessments for either the administrative (maintenance and functioning) or research activities of the Board and not used for the expenses of the applicable crop year, may be used in paying the Board's expenses of the first four months of the succeeding crop year. No later than the fifth month the amount not expended from assessments collected for administrative-research in the previous crop year shall be retained in the operating reserve fund. Any amounts, not credited pursuant to Sec. 981.41 for a crop year may be used by the Board for its marketing promotion expenses of the succeeding crop year, and any unexpended portion of those amounts at the end of that crop year shall be retained in the marketing promotion portion of the operating reserve fund. Any funds in each portion of the operating reserve fund in excess of the level authorized pursuant to paragraph (c) of this section shall be refunded to handlers or used to reduce the

assessment rate of the subsequent crop year, as the Board may determine. Each handler's share of a refund shall be the amount by which his payment of assessments exceeds his pro rata share of the two major classifications of Board expenses. For the purpose of computing any refund from the marketing promotion portion, each handler's payment of assessments shall include any amount credited to the handler pursuant to Sec. 981.41. In lieu of a refund, each handler may have the amount due him credited to his assessment obligation of the crop year in which the amount would be refunded.

(c) . . . * * *

(d) Disposition of funds upon termination. Any money collected from assessments hereunder and remaining unexpended in possession of the Board upon the termination of this part shall be distributed in such manner as the Secretary may direct.

7 C.F.R. § 981.441

§ 981.441 Crediting for marketing promotion including paid advertising.

(a) In order for a handler to receive credit for his marketing promotion expenditures, including paid advertising, against his pro rata expense assessment obligation pursuant to § 981.41(c), the Board shall determine that such expenditures meet the applicable requirements of this section.

(b) Each paid advertisement must be published, broadcast, or displayed and other marketing promotion activities must be conducted during the crop year for which credit is requested,

except that a handler may receive credit up to a maximum of 40 percent of his total creditable advertising and promotion obligation as of the June 30 redetermination report for expenditures made for advertisements published, broadcast, or displayed and other marketing promotion activities conducted no later than December 31 of the subsequent crop year. A handler utilizing this extension shall: (1) File any required documentation with the Board no later than the following January 31, and (2) certify to the Board, at the time of the June 30 redetermination, his planned expenditures during the extension period.

(c) The following requirements shall apply to crediting for paid advertising:

(1) Credit granted by the Board for paid advertising shall be that which is appropriate when compared to the applicable outlet rate published in the domestic or Canadian catalogs of Standard Rate and Data Service or station, publisher, or outdoor rate cards. In the case of claims for credit not covered by any such source, the Board shall grant the claim if it is consistent with rates for comparable outlets. For advertisements in markets other than the United States and Canada, paragraph (c)(4) of this section shall apply.

(2) The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

(3) Credit for paid advertising shall be granted:

(i) For 100 percent of a handler's payment to an advertising medium: (A) For a generic advertisement of California

almonds; (B) for an advertisement of the handler's brand of almonds; (C) when either of these advertisements includes reference to a complementary commodity or product; (D) for a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler; or (E) for in-store supermarket advertisements using fixed position or video media, when such payments are made through an advertising firm: (*1*) Fixed position advertisements must include at least two of the following: (*i*) Processed color displays enclosed in plastic frame and mounted on supermarket shopping carts; (*ii*) overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or (*iii*) processed color advertisements enclosed in frames and mounted on a supermarket shelf; (*2*) Video advertisements must be shown on a fixed video monitor running television commercials, or infomercials for specific products on a rotating basis.

(ii) For an advertisement resulting from joint participation by a handler and a manufacturer or seller of a complementary commodity or product, and including the brands of both, the credit shall be 50 percent of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iii) For an advertisement resulting from joint participation by a handler and manufacturers or sellers of two complementary commodities or products, and including the brands of all three, the credit shall be one-third of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iv) When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50 percent raw shelled almonds by weight, and (C) the almond product displays the handler's brand. With respect to almond butter advertising, the credit shall be 100 percent of the total allowable payment to the advertising medium or 100 percent of the handler's payment thereof, whichever is less. For the handler to receive credit, the almond butter must meet the specifications contained in § 981.466, and the handler's brand must be displayed.

(4) Credit for media expenditures in a foreign market shall be granted:

(i) For handler's unreimbursed media expenditures for advertising in any foreign market pursuant to a contract with the Foreign Agricultural Service, U.S. Department of Agriculture, and/or the California Department of Food and Agriculture provided the advertisements meet the requirements of paragraphs (c)(2) and (3) if this section and the limitation of paragraphs (c)(5) (i) and (ii) of this section.

(ii) For a handler's media expenditures for brand advertising in Australia, Belgium, Denmark, Finland, France, Great Britain, Hong Kong, Ireland, Italy, Japan, Korea, Luxembourg, the Netherlands, New Zealand, Norway, the Philippines, the People's Republic of China, Singapore, Sweden, Switzerland, Taiwan, and West Germany, credit shall be allowed when claims are substantiated by applicable rate cards. The provisions of this section applicable to domestic advertising shall also apply to the crediting of advertising in these markets.

Appendix H

(5) Credit granted a handler shall be subject to other conditions as follows:

(i) No credit shall be granted to a handler when more than two complementary branded products are included in an advertisement.

(ii) Advertisements which, in addition to promoting California almonds, also mention or promote the sale of noncomplementary commodities or products, or of competing nuts, shall not be eligible for credit.

(iii) Advertisements which direct consumer to one or more named retail outlets, other than handler operated, shall not be eligible for credit.

(6) A handler must file a claim with the Board to obtain credit for an advertising expenditure. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that documentation will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance as follows:

(i) For published advertisements, submit a copy of the publication invoice, agency invoice, if any, and tear sheet of the advertisement.

(ii) For radio advertisements, submit a copy of the station invoice, a copy of the script, or reference to a copy on file with the Board, and the agency invoice, if any.

(iii) For television advertisements, submit a copy of the station invoice, a copy of the script and tape or story board of the advertisement, or a reference to these in the Board files, and the agency invoice, if any.

(iv) For outdoor advertisements, submit a copy of the company invoice, a photograph of the display or a reference to a photograph in the Board files, and the agency invoice, if any.

(v) For in-store supermarket advertising, submit a copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

(d) The following requirements shall apply to crediting for marketing promotion other than paid advertising:

(1) Credit for marketing promotion expenditures shall be granted:

(i) For the distribution of sample packages containing one-half ounce or less of almonds to charitable or educational outlets. Such sample packages shall be packed for the Board under its

generic label and sold to the distributing handlers at the price paid for them by the Board. Credit shall be based on the price a handler pays the Board for such packages and upon receipt by the Board of acceptable proof of distribution. Such sample packages may or may not be personalized with an individual handler's label. Credit applicable to the distribution of sample packages shall be subject to the following conditions:

(A) A handler may receive credit for 150 percent of the purchase price of such packages against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(B) A handler may receive credit for 100 percent of the purchase price of such packages against the creditable assessment obligation incurred on the second 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(C) No credit shall be granted in excess of the creditable assessment obligation incurred on 8,000,000 redetermined kernel weight pounds received by a handler during a crop year.

(D) No credit shall be granted for sample packages distributed to market segments where almonds are already being sold. Handlers shall obtain approval from the Board prior to distribution to ensure that this condition is met.

(E) No credit shall be applicable to the distribution of sample packages in outlets where they will be used for resale.

(F) Handlers must place written orders for sample

packages with the Board no later than February 1 of any crop year except to the extent that handlers use the deferment provision found in paragraph (b) of this section: *Provided*, That for the 1988-89 crop year, handlers must place written orders no later than March 15, 1989. Handlers must place written orders for sample packages with the Board no later than August 15 of any crop year to receive credit for up to 40 percent of their creditable assessment obligations when using the deferment provision pursuant to paragraph (b) of this section.

(g) Handlers must file claims with the Board in order to receive credit for the distribution of sample packages. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of distribution will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance. This proof shall consist of a signed statement from the organization to which sample packages were distributed, on that organization's letterhead, stating:

(1) the name and address of the handler from whom the packages were received;

(2) The date of receipt;

(3) The volume of packages received;

(4) How such packages will be used; and

(5) A statement that such packages will not be used for resale.

(ii) For promotion materials available from the Board and sold to handlers at the price paid for them by the Board. Credit shall be granted for the amount a handler pays the Board for such materials upon purchase. Such materials may or may not be personalized with the label of an individual handler.

(iii) For costs directly related to mail order promotion subject to the following conditions:

(A) Credit shall only be granted for the following expenditures:

(*1*) For the purchase of mailing lists to conduct mail order promotions.

(*2*) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of $25,000 per handler per crop year.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit),

stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion including paid advertising subject to the following conditions:

(1) A handler may receive credit for 150 percent of a payment made to the Board against the creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for the handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year: *Provided*, That for the 1988-89 crop year for claims not previously filed on or before January 31, 1989, a claim or supplementary claim must be filed with the Board on ABC Form 31 on or before March 31, 1989. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year: *Provided*, That for the 1988-89 crop year, payments not previously made on or before January 31, 1989,

must be made as follows: One-third on or before March 31, 1989; one-third on or before May 31, 1989; and one-third on or before June 30, 1989. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline of this paragraph, credit for payment shall revert to the 100 percent basis.

[47 FR 40784, Sept. 16, 1982, as amended at 48 FR 11250, Mar. 17, 1983; 49 FR 19798, May 10, 1984; 50 FR 16452, Apr. 26, 1985; 52 FR 13428, Apr. 23, 1987; 52 FR 37926, Oct. 13, 1987; 52 FR 45611, Dec. 1, 1987; 54 FR 5409, Feb. 3, 1989; 54 FR 6866, Feb. 15, 1989]

(2)

Supreme Court, U.S.
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No. 95-1978

In the Supreme Court of the United States

OCTOBER TERM, 1995

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1996

QUESTION PRESENTED

Whether principles of sovereign immunity barred the district court from ordering the government to reimburse petitioners for funds that they paid to third parties for "creditable advertising," which offset assessments petitioners would otherwise have paid under a marketing order later held to be unconstitutional.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 67 F.3d 874. An earlier opinion of the court of appeals (Pet. App. 19a-61a) is reported at 14 F.3d 429. The order of the district court (Pet. App. 70a-94a) and the judgment of the district court (Pet. App. 62a-69a) are unreported. The four earlier orders of the district court are not officially reported. Three of those orders are published, however, at 51 Agric. Dec. 44, 85, and 79. The opinions of the Judicial Officer of the Department of Agriculture are reported at 50 Agric. Dec. 23, 171, and 183.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1995. A petition for rehearing was denied on February 20, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on May 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act (AMAA) of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue marketing orders to maintain market stability for certain agricultural commodities, including almonds. 7 U.S.C. 608c(1), (2) and (3). Pursuant to that authority, the Secretary has promulgated a marketing order regulating the handling of almonds grown in California. 7 C.F.R. 981.1-981.92. The marketing order is administered by the Almond Board of California (the Board), a body composed of industry representatives appointed by the Secretary. 7 C.F.R. 981.30-981.40.[1]

The AMAA provides that a marketing order may establish "marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. 608c(6)(I). Since 1971, the marketing order for California almonds has authorized the Board to conduct a generic advertising

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[1] The members of the Board serve without compensation and are subject to removal by the Secretary at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d). The Board is responsible for recommending a yearly budget for administering the marketing order (including a budget for advertising and other types of promotion), which the Secretary may accept or reject. 7 U.S.C. 608c(7)(C); see, *e.g.*, 7 C.F.R. 981.41.

program for that commodity. See 36 Fed. Reg. 20,887 (1971); 59 Fed. Reg. 35,224 (1994).

The Board's activities, including its administration of the generic advertising program,[2] are funded through mandatory assessments on almond "handlers" (i.e., processors and distributors of almonds, see 7 C.F.R. 981.13, 981.16), based on the volume of almonds that they handle, see 7 U.S.C. 608c(6)(I), 610(b)(2)(ii); 7 C.F.R. 981.41(a), 981.81(a). Under the marketing order, a handler may receive a limited credit against the portion of its assessment that is attributable to promotional activities by the Board if the handler engages in certain private promotional activities (including paid advertising) that promote the sale and usage of almonds and almond products. 7 U.S.C. 608c(6)(I); 7 C.F.R. 981.41(c). Those private activities are known as "creditable advertising." The Secretary has issued regulations establishing the criteria to be used by the Almond Board in determining whether monies spent by a handler for promotional activities may be credited against the handler's assessment. 7 C.F.R. 981.441.

During the crop years at issue in this dispute,[3] the creditable advertising regulation, 7 C.F.R. 981.441

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[2] Although the Board has been authorized to conduct generic advertising since 1971, it did not do so during the time period at issue in this case. Rather, the Board engaged only in generic almond promotion activities such as distributing almond recipes and producing promotional materials for school lunch programs. See Pet. App. 22a.

[3] Petitioners' First Amendment challenge to the generic advertising program for almonds involves the crop years 1980-1981 through 1991-1992. While that claim was under submission to the court of appeals, the Secretary promulgated an interim final rule proposing revisions to the creditable advertising

(1992), provided that, in order for a handler to receive credit for its marketing promotion expenditures, "[t]he clear and evident purpose of each advertisement" must have been to "promote the sale, consumption, or use of California almonds." 7 C.F.R. 981.441(c)(2) (1992). The regulation further provided that certain types of advertising would not earn credit: advertising of more than two "complementary" products; advertising of products that contain less than 50% almonds; advertising that referred to "competing [types of] nuts"; and advertising that directed consumers to specific retail stores. 7 C.F.R. 981.441(c)(3)(iv) and (c)(5)(i)-(iii) (1992).

The AMAA affords a handler the opportunity to petition the Secretary for relief from any provision of a marketing order on the ground that the provision is "not in accordance with law." 7 U.S.C. 608c(15)(A). A handler who is dissatisfied with the final action of the

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regulation in the almond marketing order. 58 Fed. Reg. 43,500 (1993). Several of the proposed revisions concerned restrictions on the types of advertising by individual almond handlers for which credit was available. See *id.* at 43,501-43,503. The court of appeals issued its decision invalidating certain provisions of the prior marketing order in December 1993. Pet. App. 19a-61a. Following that decision, the Secretary reopened the period for comments on the proposed revisions to the creditable advertising regulation. 59 Fed. Reg. 4247 (1994). In particular, the Secretary invited comments on the potential effect of the court of appeals' decision on that regulation. *Ibid.* The Secretary adopted a final rule revising the creditable advertising regulation in July 1994. 59 Fed. Reg. 35,222 (1994). The revisions, *inter alia*, eliminate many of the former restrictions on the types of advertising for which an individual handler may receive credit against its assessment. See *id.* at 35,226-35,227. The current regulation is not at issue in this case.

Secretary in an administrative proceeding may seek judicial review of that action in the district court, which is "vested with jurisdiction in equity to review" the Secretary's ruling. 7 U.S.C. 608c(15)(B).

2. a. Petitioners are handlers and producers of almonds grown in California who are subject to the almond order. Petitioners Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., and Carlson Farms filed an administrative petition with the Secretary pursuant to 7 U.S.C. 608c(15)(A) alleging, among other things, that various provisions of the marketing order for California almonds, including certain provisions of the creditable advertising regulation, violated the First Amendment. Pet. App. 23a. In separate administrative petitions, petitioners Cal-Almond, Gourmet Packing Co., and Gold Hills Nut Co. also challenged the lawfulness of various provisions of the order and the accompanying creditable advertising regulation on First Amendment grounds. *Id.* at 24a. In all four proceedings, the Judicial Officer (JO) of the Department of Agriculture, acting on behalf of the Secretary, rejected petitioners' claims. *Id.* at 23a, 24a.

b. Petitioners sought review of the JO's decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. 608c(15)(B). The district court upheld the JO's rulings in all respects. Pet. App. 24a.

c. The court of appeals affirmed in part and reversed in part. Pet. App. 19a-61a. The court rejected petitioners' non-constitutional challenges to the administration of the marketing order.[4] It

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[4] Those claims concerned the procedures by which assessments were imposed under the order (Pet. App. 39a-46a); the

further concluded, however, that the almond promotion program violated the First Amendment.

In addressing petitioners' First Amendment challenge, the court applied the test that this Court set out in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), for determining the constitutionality of regulations that suppress or limit commercial speech. The court of appeals agreed with the government that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial governmental interest. It concluded, however, that the Secretary had failed to satisfy the *Central Hudson* standard because, in its view, the almond advertising regulations did not "directly advance" the government's asserted interest in increasing almond sales, and were more "extensive than necessary" to serve that interest. Pet. App. 33a, 39a. With respect to the provisions of the order relating to creditable advertising, the court held that those provisions were more restrictive than necessary to serve the government's stated interest because, in its view, the government had not justified the regulations' denial of credit for certain categories of private advertising. *Id.* at 38a. Noting the "fact-intensive nature" of the question of an appropriate remedy, the court remanded the case to the district court for a determination of the remedial question. *Id.* at 61a.

3. On remand to the district court, petitioners sought refunds of the assessments they paid to the Board, as well as reimbursement of monies that they

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reserve requirements used to stabilize the volume of almonds marketed (*id.* at 47a-60a); and the administrative procedure for challenging the order (*id.* at 60a-61a).

paid to third parties, such as advertising and promotional firms, for creditable advertising. Pet. App. 71a. Petitioners Cal-Almond, Saulsbury Orchards and Frazier Nut Farms, Inc. also sought the release of monies that they placed in escrow accounts in lieu of paying assessments to the Board or conducting their own creditable advertising. The Secretary asserted in response that principles of sovereign immunity barred reimbursement of sums that petitioners spent on creditable advertising rather than paid to the Board. Citing *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988), the Secretary argued that the former sums were "damages" for purposes of sovereign immunity analysis because they were sought as a "substitute for a suffered loss." Pet. App. 72a-74a.[5]

The district court held that petitioners were entitled both to a refund of the portion of past assessments attributable to Board-sponsored promotional programs, and to funds they paid to third parties for creditable advertising. The court ordered the government to pay petitioners a monetary award of approximately $4.3 million, consisting of: (1) $135,000 in assessments that petitioners paid to the Board; (2) $1.7 million in assessments that certain petitioners had placed in escrow accounts pending the

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[5] The government also urged the court of appeals to remand the case to the Department of Agriculture, pursuant to 7 U.S.C. 608c(15)(B), for an initial determination of the appropriate remedy. The government argued that additional fact-finding by the Department was necessary to determine whether plaintiffs "passed through" some of their advertising costs to their growers. In the alternative, the government urged the district court to conduct an evidentiary hearing to make those determinations. See Pet. App. 79a-94a.

outcome of the litigation; and (3) $2.5 million representing sums petitioners paid to third parties for creditable advertising. Pet. App. 66a-69a. The court rejected the Secretary's argument that sovereign immunity principles barred petitioners from recovering sums expended for creditable advertising. *Id.* at 77a. It concluded that "the refund or reimbursement of these amounts is part of an equitable remedy designed to give to these plaintiffs what * * * they were entitled to because of the violation of the First Amendment." *Ibid.*[6]

4. The court of appeals reversed in relevant part.[7] Pet. App. 3a-18a. It held that sovereign immunity precludes petitioners from recovering from the government their expenditures for creditable advertising. *Id.* at 7a. The court observed that "[r]equiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige the USDA to 'substitute' money from its coffers for money the handlers had paid to third parties." *Ibid.* "Unlike the assessments paid directly to the Board," the court explained, the government could not "return the 'precise property wrongfully taken' because that money was not paid to the USDA." *Ibid.* Reimbursement of the money petitioners spent on creditable advertising, the court held, would therefore constitute damages. *Ibid.* Because "nothing in the

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[6] The district court denied petitioners' request for prejudgment interest, holding that such an award was barred by sovereign immunity. Pet. App. 78a.

[7] The court affirmed the district court's refusal to reduce the amount of petitioners' refund to take into account the benefit that plaintiffs received from the generic advertising purchased with their assessments. Pet. App. 11a-14a. That aspect of the court of appeals' decision is not at issue here.

[AMAA] demonstrates congressional intent to waive sovereign immunity for the claims raised by [petitioners]," the court held that their "claims for reimbursement for money spent on creditable advertising are barred by sovereign immunity." *Ibid.*[8]

ARGUMENT

1. The court of appeals correctly held that the doctrine of sovereign immunity bars a judicial order requiring the government to reimburse petitioners for monies they paid to third parties for creditable advertising. The United States may be sued only with respect to matters for which Congress has waived sovereign immunity. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Eckford*, 73 U.S. (6 Wall.) 484, 490 (1867). A waiver of sovereign immunity, moreover, cannot be found in the general purposes of a statute, *United States* v. *Testan*, 424 U.S. 392, 399-400 (1976), or in policy considerations underlying the statute, *Library of Congress* v. *Shaw*, 478 U.S. 310, 320-321 (1986). Rather, "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon

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[8] The government has filed a petition for a writ of certiorari seeking review of the judgment of the court of appeals with respect to the underlying First Amendment issue, *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879 (filed May 20, 1996). In that filing, we urge the Court to hold the petition for disposition in light of the outcome in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, cert. granted, No. 95-1184 (June 3, 1996). In *Wileman Bros.*, the Ninth Circuit relied on its initial decision in the present case to hold that similar assessment-funded promotional programs authorized under the AMAA for peaches, nectarines, and plums violate the First Amendment.

is an expression in statutory text." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

Like a waiver of sovereign immunity itself, a waiver of immunity to a particular remedy also "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). "[T]he Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U.S. at 33-34 (citations and internal quotation marks omitted). Accordingly, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096-2097 (1996). Because the relief that petitioners seek here constitutes monetary damages for which Congress has not waived the government's sovereign immunity, petitioners' claims are barred.

a. Petitioners err in contending (Pet. 8) that, by enacting 7 U.S.C. 608c(15), "Congress unequivocally consented" to suits for damages by handlers. Section 608c(15) affords handlers of agricultural commodities the right to seek administrative review of "any [marketing] order or any provision of any such order or any obligation imposed in connection therewith," on the ground that the challenged provision or obligation is "not in accordance with law." 7 U.S.C. 608c(15)(A). A handler may seek judicial review of the Secretary's decision in the district court, which is "vested with jurisdiction in equity to review" a ruling of the Secretary. 7 U.S.C. 608c(15)(B). While Section 608c(15)(A) authorizes judicial review of the Secretary's rulings, nothing in that provision unambiguously extends the waiver of sovereign immunity to

monetary damages. See *Lane* v. *Pena*, 116 S. Ct. at 2096-2097. To the contrary, the explicit statutory conferral of jurisdiction only "in equity" forecloses an award of a legal remedy such as money damages. See *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 255 (1993).

b. Petitioners incorrectly assert (Pet. 14-15) that the decision below conflicts with *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). *Ruzicka* held only that a handler must exhaust the administrative remedy provided by the AMAA before pursuing a challenge to a marketing order in federal court, and that the handler may not withhold assessments during the pendency of those proceedings. It did not address the scope of the waiver of immunity effected by Section 608c(15), or the particular remedies that are available in administrative or judicial proceedings under the AMAA. 329 U.S. at 289-294.

c. Petitioners next contend (Pet. 13) that compensation for funds they paid to third parties for creditable advertising would not be damages, but rather "equitable relief * * * and therefore not repugnant to the sovereign immunity doctrine." This Court has recognized a distinction under the sovereign immunity doctrine between money damages and specific monetary relief. "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988) (quoting *Maryland Dep't of Human Resources* v. *Department of HHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)).

Petitioners paid the funds at issue here—expenses for private, creditable advertising—not to the govern-

ment, but to third parties. Moreover, the government was not required, under the AMAA or the Constitution, to expend public funds for private advertising. Accordingly, as the court of appeals observed (Pet. App. 7a), "[the government] cannot return the precise property wrongfully taken," and a "refund" of petitioners' losses would represent damages rather than specific relief. Because "nothing in the [AMAA] demonstrates congressional intent to waive sovereign immunity" for monetary damages (*ibid.*), the court correctly held that such compensation is barred.[9]

d. Petitioners suggest (Pet. 13-14) that because the almond marketing order considers both creditable-advertising expenses and past assessments in calculating certain types of refunds to handlers, 7 C.F.R. 981.81(b), a judicial decree ordering the "refund" of either amount would not represent damages under the sovereign immunity doctrine.[10] The

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[9] Nor is there any merit to petitioners' contention (Pet. 16) that the court of appeals' prior liability determination in this case (Pet. App. 27a-39a) established that the funds at issue were illegally "exacted or retained," *United States* v. *Testan*, 424 U.S. 392, 401 (1976), by the government. As the court of appeals explained in the opinion below (Pet. App. 10a), its prior decision held only that the system of assessments for generic almond promotion and credits for certain private advertising violated the First Amendment. That decision did not address "whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties [in light of] the doctrine of sovereign immunity." *Ibid.*

[10] The regulation on which petitioners rely provides in pertinent part:

> Any funds in each portion of the operating reserve fund in excess of the level authorized * * * shall be refunded to handlers or used to reduce the assessment rate of the subsequent crop year * * *. Each handler's share of a

provision to which petitioners refer states only that both types of payments will be considered by the Board in determining the refund that a particular handler will receive in the event that funds collected by the Board in a given crop year exceed the Board's administrative and promotional expenses plus established carry-over and reserve amounts. That provision does not alter the fact that reimbursement for creditable advertising payments to third parties would be compensation for petitioners' losses, rather than a return of specific property that was wrongfully retained by the government. In any event, the Secretary could not waive federal sovereign immunity by promulgating a regulation; any effective waiver must be based on "affirmative statutory authority" from Congress. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940).[11]

> refund shall be the amount by which his payment of assessments exceeds his pro rata share of the two major classifications [administrative and research activities] of Board expenses. For the purpose of computing any refund from the marketing promotion portion, each handler's payment of assessments shall include any amount credited to the handler pursuant to [7 C.F.R.] § 981.41.

7 C.F.R. 981.81(b).

[11] Petitioners assert, without authority (Pet. 20), that "[s]ince § 608c(15) specifically gave handlers the right to sue, sovereign immunity does not bar refunds by the Almond Board, nor by Petitioners receiving credits against future assessments." Section 608c(15)(A) provides for judicial review of an order of the Secretary; it does not provide for suits or relief against the Board. Furthermore, the bar of sovereign immunity cannot be evaded merely by altering the form in which damages are awarded. Neither of petitioners' proposals would alter the compensatory nature of the relief they seek.

2. The tax cases cited by petitioners are inapposite for a number of reasons. See Pet. App. 13a, citing *Reich* v. *Collins*, 115 S. Ct. 547 (1994); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993); and *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). First, none of those cases involved a federal defendant and, consequently, none addressed the question of federal sovereign immunity. Second, each of the cases cited by petitioners involved the refund of monies paid *to the government* under a tax scheme later found to be invalid. See, *e.g.*, *Reich* v. *Collins*, 115 S. Ct. at 549. None of those cases stands for the proposition that due process requires a taxing authority to compensate taxpayers for expenses they paid to third parties as a result of an invalid tax regime. Petitioners' suggestion (Pet. 13) that the federal government must waive its sovereign immunity in this context in order to comport with the Due Process Clause is incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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FURTHER REASONS FOR GRANTING THE WRIT

Congress provided in § 8c(15) of the AMAA, 7 U.S.C. § 608c(15), a comprehensive scheme of administrative and judicial review of "obligations" such as the tax at issue in this case. Petitioners challenged the tax as a violation of the First Amendment and won. The Ninth Circuit held unconstitutional that portion of the assessment used for advertising and promotion. Until now, the courts have accepted USDA's argument that a post-deprivation remedy does not deny due process because it affords aggrieved handlers complete relief, i.e. a refund of any tax or assessment imposed under the AMAA. Until now, the courts have also accepted USDA's mantra that the statute should be construed to deny any pre-deprivation remedy so that the regulatory program can continue to operate while the challenge proceeds through the laborious exhaustion process. But now, USDA proposes to upset this delicate balance and eviscerate the complete remedial scheme provided by Congress by denying the traditional refund remedy for the advertising and promotion tax that was paid at the direction and with the approval of the Secretary to third parties. Respondent cites nothing from the language or legislative history of the statute, or from judicial decisions interpreting and applying the remedy provisions, to justify the severe limitation it wants to impose on the scope of the refund remedy for unconstitutional assessments. USDA's severe limitation of the refund remedy eviscerates the carefully balanced remedial scheme designed by Congress which protects program integrity while providing handlers a meaningful remedy. *United States v. Ruzicka*, 329 U.S. 287 (1946) (mandatory exhaustion does not violate due process because handlers' rights protected by post-deprivation refund remedy); *cf. Anniston Mfg. v. Davis*. 301 U.S. 337 (1937) (approving a limitation on the refund remedy that required handlers to prove they did not pass on the tax). USDA's interpretation of the AMAA would deny due process because it would leave handlers with no remedy, either pre- or post-deprivation for the portion of

the tax paid to third parties at the direction of USDA. *Reich v. Collins*, __ U.S. __, 115 S. Ct. 547 (1994). Finally, USDA's interpretation fails to account for the alternative non-monetary remedies sought by Petitioners, e.g., credits towards future assessments, or a refund from the Almond Board.

1. a. Congress unequivocally consented to Petitioners' suit for refund of the tax. Congresses could not more clearly consent to suit than in did in the AMAA by empowering injured handlers to challenge an "obligation" such as the tax at issue in this case. USDA does *not* dispute that Cal-Almond's challenge is within the scope of Congress's consent. Instead, USDA seeks to redraw the scope of that consent by excluding from the refund remedy that part of the tax USDA ordered paid to third parties.

Respondent misconstrues the "sovereign immunity issue" involved in this case (Br. in Opp. 9-10). Petitioners are challenging an "obligation," *i.e.* the tax imposed on them and exacted from them, and are not seeking traditional "money damages" (Pet. App. 7a) for an injury done do them, *see Bowen v. Massachusetts*, 487 U.S. 879, 914 (1988) (Scalia, J., dissenting). Whether Petitioners' taxes were paid directly to USDA, directly to the Board, or directly to a third party approved by USDA to receive said assessments to satisfy the Petitioners' obligation, USDA's mandate had the same affect on Petitioners, the unconstitutional exaction of money that the Petitioners were entitled to keep.

Respondent argues that a refund in the form of money is not available because Congress did not specifically provide for such a remedy. The sovereign immunity cases of this Court cannot be read so narrowly. This Court held in *Federal Deposit Insurance Corporation v. Meyer*, __ U.S. __, 114 S. Ct. 996 (1994) that Congress, enacting "sue-and-be-sued" language, broadly waved sovereign immunity against the Government or a federal agency unless Congress also precludes certain types of remedies.

> In the past, we have recognized that such sue-and-be-sued waivers are to be "liberally construed," [citation], notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign. [citations] *Burr [Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940)] makes it clear that sue-and-be-sued clauses cannot be limited by implication unless there has been a 'clear showing that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a Government function, or that for other reasons it was plainly the purpose of Congress to use 'sue-and-be-sued' clause in a narrow sense.' [*Burr*, 309 U.S. 245]

Id. at 1003.

The AMAA expressly provides Petitioners with the right to petition the Secretary for an *exemption* from any *obligation* imposed under a marketing order that is "not in accordance with law," and for judicial review of the Secretary's decision. 7 U.S.C. § 608c(15)(A), (B). In *United States v. Ruzicka*, 329 U.S. 287 (1946), this Court interpreted the remedial scheme of the AMAA to provide for a complete remedy to handlers whose assessments were unlawful.[1] The Court disallowed a pre-deprivation remedy, *i.e.* injunctive relief, and required exhaustion of administrative

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1. This Court also found that with respect to predecessor legislation to the AMAA, that when the Court found the "processor tax" of the Agriculture Adjustment Act to be unconstitutional Due Process *required* a refund of the unconstitutional assessments. *Anniston MFG. v. Davis*, 301 U.S. 337 (1937); *Weibresteib Co. v. Commissioner of IRS*, 324 U.S. 164 (1945).

remedies to preserve the integrity of the program. The remedial scheme was adequate and complete because handlers were guaranteed a refund of the tax if their challenge was eventually successful. *Id.* at 292-93, 295. The assessments at issue in *Ruzicka*, like the almond program, were not paid directly to the Treasury, but to a producer settlement fund administered by third parties. The fund paid a uniform price to producers for their benefit. The refund due a successful handler was not and never has been characterized as "money damages," and was not the return of specific property but an amount of money from the fund equal to the handler's "obligation" found unlawful in the challenge.

Respondent's limitation on the remedy would eviscerate the careful balance struck by Congress and would write the word "exemption" out of § 608(c)(15). Since exhaustion of remedies is mandatory, the only way for Petitioners to receive the "exemption" allowed by Congress as a remedy is to receive a refund of the tax "obligation" found unlawful. As explained in *Meyer, supra*, quoting *Burr, supra*, sovereign immunity does not bar the refund of assessments ordered by the Secretary to be paid *or spent* as authorized by Congress (7 U.S.C.§ 608c(6)(I); Pet. App. 107a) because Congress unequivocally consented to Handlers' petitions to challenge the tax "obligation" and did not "clearly" preclude that type of remedy. *Meyer, supra*, 114 S. Ct. at 1003, citing *Burr, supra*, 309 U.S. at 205.

Moreover, Congress could not require exhaustion of administrative remedies and at the same time order the payment of assessments, and then deny a refund of said assessments found to have been unconstitutionally exacted, without violating Due Process.

Respondent butchers this Court's holding in *United States v. Ruzicka, supra*, (Br. in Opp. 11). Respondent contends that *Ruzicka* held "only" that a handler must exhaust administrative

remedies before pursuing a challenge to a marketing order in federal court and may not withhold assessments during the pendency of these proceedings, did not address the scope of the waiver of immunity in § 608c(15) or the particular remedy available in administrative or judicial proceedings. In *Ruzicka*, Respondent specifically argued that mandatory exhaustion of administrative remedies and the denial of a pre-deprivation equitable remedy did not deny due process because the handler would be entitled to a refund in the event he eventually prevailed in the administrative proceedings. No doubt, that is a reason *why* this Court held in *Ruzicka* that the statutory scheme established by Congress (7 U.S.C. § 608c(15)(A) & (B)) "will give the respondents the rights to which Congress said they were entitled" (*Id.* at 293) and that the complete remedial scheme "thereby safeguarded individual as well as collective interests." *Id.* The Respondent's attempt here to deprive Petitioners of a refund remedy for a part of their tax "obligation" aims a missile directly at the comprehensive scheme Congress established under the AMAA and as interpreted by this Court in *Ruzicka*.

Therefore, sovereign immunity cannot bar a refund remedy based solely on where the Secretary directed that part of the tax to be paid.

b. USDA argues that Handlers may not be refunded that part of the tax paid to third parties rather than to the Board. USDA cannot deny that its argument deprives Handlers of any remedy for this part of the tax. USDA's argument not only limits the scope of the consent to suit (by adding an "except for . . . " behind "obligation") but eviscerates the balanced remedial scheme approved by this Court in *Ruzicka*.

Congress made no distinction, for purposes of Handlers' right to a refund, between the various uses of the tax. The Respondent erroneously states (Br. in Opp. 3) that the creditable advertising assessment at issue here are for "private promotional

activity." In fact the tax is imposed (and the credits allowed) for mandated activities to carry out the Government's purpose of advertising and promoting California almonds. The promotion and advertising activities of the Board are "designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds." 7 C.F.R. § 981.41 (Pet. App. 113a). The Secretary may provide for crediting a handler's direct expenditures for marketing promotion and advertising, that promotes the sale of almonds, and that said expenditures may include "money spent for advertising space or time in newspaper, magazines, radio, television, transit and outdoor media, *including the actual standard agency commission costs not to exceed 15%.*" 7 C.F.R. § 981.41(c) (emphasis added). No "promotion or advertising shall be undertaken without reason to believe that returns to producers will improved by such activity." 7 C.F.R. § 981.41(d)(3) (Pet. App. 115a). Finally, § 981.41(e) (Pet. App. 115a) states that the Secretary, after recommendation by the Board, "shall prescribed appropriate rules and regulations as are necessary to effectively regulate such activity," which are set forth in § 981.441 (Pet. App. 117a-127a).

Therefore, the "creditable advertising" part of the tax is not "private" because Handlers spend it for the "public" benefit of producers, who are not regulated and do not pay the tax, and because they have no *choice*. The Ninth Circuit found in *Cal-Almond I* that the Petitioners not only did not benefit from the creditable advertising regulations whatsoever, but that in fact the regulations hindered their own efforts. (Pet. App. 34a-37a & n. 10).

c. USDA mischaracterizes the relief sought as "money damages." Handlers are challenging the "obligation," i.e. the tax imposed. This is not a case like *Lane v. Pena*, __ U.S. __, 116 S. Ct. 2092 (1996), in which Congress carefully crafted a scheme that provided challenges and precisely delineated remedies against a specified set of entities for a specified set of injuries.

Congress did *not* distinguish the part of the tax for which Handlers could petition for a refund from the part of the tax for which a refund is barred. The tax imposed on Handlers is a single undivided amount. The statutory "obligation" is to pay this tax to the Board, the agent of the Secretary. Congress made no distinction for purposes of the refund remedy as to how the taxes were used by the Board. The Board uses part of the tax to pay the expenses of administering this regulatory program, and part for its generic promotion program. Petitioners *must* either pay the major portion of the tax to third party advertisers approved by the Board or pay to the Board which then spends it for its various promotional and advertising programs. The Ninth Circuit found both choices unconstitutional (Pet. App. 5a, 10a-11a, *Cal-Almond II*: 25a-28a, *Cal-Almond I*).

Respondent's argument (Br. in Opp. 11-12) that Petitioners are really seeking "money damages" ignores the regulatory treatment of the "creditable" portion of the tax obligation.

First of all, § 981.81(b) of the Order (Pet. App. 115a-116a) explains that, for purposes of refunds, the Secretary treats handler expenditures to "third parties" through creditable advertising the same as payment to the Board. Thus, it is the *Respondent* that treats the two forms of expenditures exactly the same. Secondly, Congress specifically provided (7 U.S.C. § 608c(6)(I); Pet. App. 107a) the Secretary with the authority to levy assessments upon the handlers to carry out promotion and advertising, and with respect to almonds, to credit the prorata expense assessment obligations of a handler "with all or any portion of his direct expenditures for such marketing promotion including paid advertising as maybe authorized by the order." Congress specifically stated that the handler's own expenditures for advertising would be credited to the handler's prorata share of assessments otherwise required to be paid to the Secretary. (7 U.S.C. § 610; Pet. App. 110a-111a).

Third, it was the *Secretary* (as authorized by Congress) that imposed the assessment each year and required the handler to either pay it to the Board or pay it to these third parties authorized by USDA to receive those assessments, subject to the Secretary's review that the assessments were properly spent on the *Secretary's* program. (7 C.F.R. §§ 981.41 & 981.441; Pet. App. 113a-127a).[2]

Respondent ignores the Ninth Circuit's holding that both forms of exaction of assessments violated the Petitioners' First Amendment rights: "We found that the assessments implicated the handler's rights to free speech and free association, regardless of whether the assessments were paid directly to the Board or satisfied by expenditures on creditable advertising and promotional activities." (Pet. App. 5a). The panel was deeply troubled by its decision: "Our analysis regarding sovereign immunity leads us to a somewhat awkward result: although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations." (Pet. App. 10a-11a).

Since Petitioners were required to exhaust administrative remedies and pay the assessments to the Board and/or third parties (both of which "choices" were found unconstitutional) the congressional and USDA scheme amounted to an unconstitutional exaction of Petitioners' money, regardless of where or to whom it was paid, and Petitioners' request for a refund of those unconstitutionally exacted assessments is nothing more than an equitable remedy for restitution or *quantum meruit*, even though the assessments were not directly paid to the Board. *See Earheart v. William Low Co.*, 25 Cal. 3d 503, 510-511, 158 Cal. Rptr. 887, 891 (Cal. Sup. Ct. 1979).

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2. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9 (1982) (Fifth Amendment protects individuals from deprivation of property without regard to whether the Government receives the property or directs a third party to receive it.)

When the Government seeks recovery of its response costs under CERCLA or is abatement costs under RCRA it is seeking *equitable* relief in the form of restitution or reimbursement of the costs that it expended. *United States v. North Eastern Pharmaceutical Chemical Co., Inc.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Here the Petitioners spent the money at Respondent's mandate for the benefit of the Respondent's program instituted to raise grower revenue. It was not spent by the handlers on the handlers' own behalf. Thus, this request for a refund, is not one for "money damages", but an attempt to provide the Petitioners the very thing to which [they were] entitled." *Bowen v. Massachusetts*, *supra*, 487 U.S. 879, 895 (1988). Petitioners were *lawfully* entitled to keep their money.

2. USDA cannot deny Handlers both a pre- and post-deprivation remedy without violating due process. *McKesson Corp. v. Div. Alcoholic Beverages & Tobacco, Fl. Dept. of Business Regulations*, 496 U.S. 18, 31 (1990) (and cases cited therein); *Harper v Virginia Dept. of Taxation*, 509 U.S. __, 113 S. Ct. 2510, 2519 (1993); *Reich v. Collins*, __ U.S. __, 115 S. Ct. 547, 550-551 (1994). It cannot be assumed that Congress intended to violate the Due Process rights of handlers who are unconstitutionally required to pay assessments or to spend assessments while they exhaust administrative remedies.

The Government has no more power to order an unconstitutional tax paid to it than it has to order an unconstitutional tax paid to a third party.[3] It cannot, therefore, then defend against a refund of the unconstitutional tax by claiming "sovereign immunity," while the Government precludes any suits to enjoin the tax collection.

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3. Respondent's attempt (Br. in Opp. 10) to distinguish these cases on the grounds that none of those tax cases involved federal defendants is incredibly shallow, given that the Due Process Clause of the Fifth Amendment applies to the Federal Government.

3. The Respondent erroneously claims (Br. in Opp. 13, n. 11) that the Government's sovereign immunity defense would still apply if the refunds came from the Almond Board or if the Petitioners received credits against future assessments. First, refunds from the Almond Board would not affect the treasury one wit, as no appropriated funds are used by the Almond Board. Secondly, Petitioners receiving credits against future assessments would not at all affect the treasury, nor is it a recovery of "money damages", and is not precluded by the specific statutory scheme (7 U.S.C. § 608c(15)(A) & (B)). Indeed, it has been recognized by this Court that sovereign immunity is not violated by allowing a taxpayer to off-set a tax obligation with a previous overpayment of taxes. (*United States v. Dalm*, 494 U.S. 596, 602-606 (1990).

CONCLUSION

It is important for this Court to grant the Petition to provide handlers with the remedy that the Government made them assume they had all along if they complied with the assessment orders. Respectfully, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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